Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 1999

CHARLES D. CONOVER, III,

Petitioner

v.

FERNALD ENVIRONMENTAL RESTORATION MANAGEMENT CORP., FLUOR DANIEL, INC.,

Respondents

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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95 pp

QUESTION PRESENTED

1. SHOULD AN AGE DISCRIMINATION PLAINTIFF WHO ESTABLISHED A PRIMA FACIE CASE AND PRETEXT AT TRIAL BE REQUIRED TO PRESENT ADDITIONAL EVIDENCE THAT HIS AGE WAS THE REASON FOR HIS DISCHARGE IN ORDER TO SUPPORT A JURY VERDICT IN HIS FAVOR?

LIST OF ALL PARTIES TO PROCEEDING BELOW

Robert J. Skalka
Joseph L. Balnites, Sr.
William E. Ponsock
Charles D. Conover, III

Plaintiffs

v.

Fernald Environmental Restoration Management Corp. ("FERMCO")
Fluor Daniel, Inc.

Defendants

Plaintiffs Skalka, Balnites and Ponsock have no interest in this Petition.

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INTRODUCTION

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled proceeding filed on May 19, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been reported at 178 F.3d 414.

The opinion of the United District Court for the Southern District of Ohio has not been reported.

The order denying rehearing en banc, dated July 21, 1999, has not been reported.

STATEMENT OF JURISDICTION

Petitioner filed his Complaint, together with co-Plaintiffs Robert J. Skalka, Joseph L. Balnites, and William Ponsock, seeking damages and injunctive relief for claims alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* and the Ohio Revised Code § 4112.14 (formerly codified at § 4101.17) and for breach of contract and promissory estoppel in the United States District Court for the Southern District of Ohio on July 27, 1994. Jurisdiction of the district court was based upon 28 U.S.C. §§ 1331, 1367.

From July 22, 1996 through August 8, 1996, Petitioner's and his three co-Plaintiffs' ADEA, breach of contract and promissory estoppel claims were tried before a jury, and their O.R.C. §4112.14 claims were tried to the court. The jury returned a verdict for Petitioner and Plaintiff Skalka, finding that Respondents had willfully violated the ADEA, and returned a defense verdict on Plaintiff Ponsock's and Plaintiff Balnites's age discrimination claims. In addition, the jury found in favor of all four Plaintiffs on their breach of contract and promissory estoppel claims. Judgment was entered on these claims on August 12, 1996 in the following amounts: Petitioner Conover, $1,545,878;[1] Plaintiff Skalka, $1,730,230; Plaintiff Ponsock, $142,000; and Plaintiff Balnites, $208,000.

Respondents moved for judgment as a matter of law, for a new trial, or to amend the judgment, and on March 27,

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[1] The district court later corrected this amount to $1,546,022, due to a clerical error.

1997, the district court denied the motion as to all claims except Petitioner's breach of contract and promissory estoppel claims. These claims were dismissed and Petitioner's award was reduced by $181,000, to $1,365,022.

Respondent appealed the case on the merits to the United States Court of Appeals for the Sixth Circuit. On May 19, 1999, the Sixth Circuit issued its opinion affirming the District Court regarding Plaintiff Skalka's ADEA claim but remanding that claim to remit a portion of the damages, and reversing the judgment in favor of Petitioner on his ADEA claim, as well as the judgments in favor of Plaintiffs Skalka, Ponsock and Balnites on their contract claims. A petition for rehearing was denied on July 21, 1999.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a), provides:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

The Respondents operated a facility at the Fernald site (a former uranium processing facility) in Hamilton County, Ohio under a contract with the United States Department of Energy ("DOE"). Pursuant to that contract, Respondent Fernald Environmental Restoration Management Corp. ("FERMCO") provided environmental clean-up services. Respondent Fluor Daniel, Inc., is the parent company of FERMCO and participated in employment decisions in connection with Respondents' August, 1993 reduction in force. FERMCO took over the clean-up management of the Fernald site from Westinghouse in December, 1992.

On April 29, 1993, FERMCO announced that budget cutbacks required a reduction in force of about 300 employees, to take place in the fall of 1993. FERMCO developed a "forced ranking" process to select which employees to terminate in this force reduction. The goal of this process was to identify those employees whose skills, abilities, experience and performance were critical to the future success of the operation, and to terminate only those employees whose skills and abilities were the least critical to FERMCO's success. In the forced ranking process, employees were divided into "peer groups" within each of FERMCO's twenty divisions. Supervisors then rated each employee in these peer groups, relative to each other, based on five companywide "values" and four "essential skills"

applicable to the employee's peer group. Then employees were ranked on the basis of these ratings.

FERMCO's top management set the number of employees needed to be cut from each division. The division managers then determined which employees would actually be discharged to meet these headcount goals, based on the results of the forced ranking process.

FERMCO openly communicated to employees these goals and the processes to be used to reduce headcount. However, in communicating the need to reduce the procurement organization, Al Valdez, Manager of Procurement,[2] stated to employees in a staff meeting that many of them would be laid off because they had been at Fernald a number of years and were "too comfortable" in their jobs.

FERMCO promised its employees fair treatment in this forced ranking process. It also promised terminated employees a fair, meaningful, good faith review of the termination decisions by a Board of Appeals. FERMCO also promised to identify available jobs for terminated employees at Fernald and match employees with those jobs.

At the time of the reduction in force, Petitioner Conover was a supervisor of procurement at Fernald. He held a bachelor's degree in Business Administration, and had received two to three hundred hours of training in various management and procurement courses, including Department of Defense training in procurement. Prior to his service at

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[2] Petitioner Conover was employed in this department at the time of his termination.

Fernald, Conover had approximately 22 years of experience in procurement, including 18 years of government-related procurement experience.

Conover was hired at the Fernald site on July 30, 1984. He spent three years as a Buyer, then was promoted to Contract Administrator in December, 1986. Conover was promoted again, to Procurement Supervisor, in March of 1987. In that position he worked closely and effectively with all departments at Fernald to ensure timely procurement and receipt of supplies, equipment and services. Petitioner effectively supervised up to 13 employees and provided monthly data and information to the DOE on performance improvement and blanket order development for "just in time" systems contracts. Westinghouse then promoted Conover to Procurement Manager, a similar position with more responsibility, in December of 1989. When FERMCO took over management of the site from Westinghouse in December 1992, it made Conover the Manager of Subcontracts.

In addition to being promoted three times in less than three years, Conover received good to excellent performance reviews throughout his employment at Fernald. In fact, his last performance evaluation rated him overall as "3.5" on a scale of 1 (does not meet expectations) - 4 (exceeding expectations).

In February, 1993, FERMCO hired Ms. Gwen Nalls as Manager of Major Subcontracts, and Conover was returned to his prior position as Supervisor of Procurement. In March of 1993, Lou Henke was promoted from senior contracts administrator, a position that reported to Conover, to the Procurement Manager position, supervising Conover and one

other supervisor, Eric Meuser, age 40. Both Conover, age 47, and Meuser had eight to ten employees reporting to them. Thus, at the time of the reduction in force, Nalls and Henke were peers and Conover, whose only peer was Meuser, reported to Henke.

At the time of the reduction in force, Nalls had three direct subordinates who were also supervisors: Paul Sturgeon, age 35, Don Liepold, age 48, and Paul Simons, age 47. All three of these employees were newly hired at the Fernald site: Liepold and Simons both began their employment on March 29, 1993 (just one month before the reduction in force was announced), and Sturgeon started in his position on April 26, 1993 (three days before the headcount reduction announcement). Similarly, Eric Meuser began working at Fernald in December, 1992, and was placed in his supervisory position after the reduction in force was announced. Thus, two new managers (Henke and Nalls) were asked to rate four new employees (Meuser, Sturgeon, Liepold and Simons) and one employee who had been in the organization for nine years (Conover).

Nalls rated Sturgeon, Liepold, and Simons, while Henke rated Conover and Meuser. Although Henke and Nalls knew that Conover, Meuser, Sturgeon, Liepold and Simons were considered to comprise one single peer group, neither consulted with the other when rating these supervisors. Moreover, Henke did not compare Conover and Meuser with Sturgeon, Liepold and Simons in his ratings, and Nalls similarly rated her own subordinates without comparing them to Conover or Meuser.

After Nalls and Henke completed these ratings, their manager, Al Valdez, combined the five ratings into a

summary sheet. Conover, having been assigned the lowest rating in that peer group despite his long years of experience both at Fernald and in procurement in general and his excellent prior performance evaluations, was terminated. Valdez had discretion about the number of employees in each peer group in his division (supervisors, buyers, data entry, and clerical) he would terminate. Indeed, he had discretion to leave a particular peer group, such as the supervisors, intact while making deeper cuts elsewhere.

In addition to Conover and Meuser, Henke rated ten to thirteen other subordinates that fell within other peer groups. Of those, he rated Jim Cheek (age 60) the lowest in the buyer peer group, despite the fact that Cheek was widely recognized as the most knowledgeable buyer on site and had the longest service in the procurement group. He also rated Marilyn Ashcraft (late 50's) and John Madaffori (late 50's) very low despite their long service in procurement. Both Ashcraft and Madaffori elected to take the early retirement package that had been offered, and Cheek was terminated.

Similarly, Henke rated the oldest employee (Jane Lucas, early 40's) in the clerical peer group lowest, and she was also terminated. Thus, of Henke's subordinates, five were separated as a result of low ratings, and all five were over 40 (four of whom were over 50). Of his remaining seven to ten subordinates, only three were over 40.

The rating process Henke and Nalls used with respect to the supervisor peer group was flawed in several ways. First, they failed to compare the five supervisors to each other relative to the retention criteria. Next, both Henke and Nalls made errors on the ratings forms that were not caught before the termination decision was made. Moreover, Henke and

Nalls never compared notes on their relative understanding of the rating scale, because Nalls rated all three of her subordinates much higher[3] than Henke rated either Conover[4] or Meuser,[5] and neither they nor Valdez ever questioned why that was or whether it was appropriate for three brand new employees to be rated so much higher than someone as experienced and with as good a performance record as Conover.

Moreover, when Henke believed that Meuser was "a little" better than Conover in any particular category, he rated him from 0.6 to 1.0 points higher than Conover. In the one category that he rated Conover higher than Meuser, he acknowledged that Conover was "a little" better than Meuser but only rated him 0.25 points higher. Henke also rated Conover without reviewing his past performance evaluations or his past experience in government procurement, either at Fernald or before his employment there. Furthermore, Henke knew of a huge problem of possible waste, fraud and abuse in Meuser's area of supervision (relating to a procurement of 650 workstations,) yet this did not affect his rating of Meuser's knowledge, skills and abilities. He also knew the Meuser needed to consult from time to time with his subordinates, as well as

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[3] Nalls rated Sturgeon 4.41 overall, Liepold 4.34 overall and Simons 4.34 overall, on a 0-5 point scale (5 being highest). These overall scores were the totals of the ratings for each individual criteria, with different weightings assigned to each criteria.

[4] Henke rated Conover as 2.58 overall.

[5] Henke rated Meuser 3.02 overall.

Conover and Cheek, regarding government procurement regulations.

Finally, Henke interpreted one of the rating criteria for evaluating the peer group as "Innovation, Initiative in Procurement," while Nalls evaluated her employees in their "Implement[ation of] Procurement System." A commonly held negative stereotype of older workers is that they are less innovative, and exhibit less initiative, than their younger peers. Thus, not only did Henke rate his supervisors using a negative age stereotype, but he and Nalls used different criteria for rating employees in the same peer group.

Henke discussed the early retirement option with those of his subordinates who were old enough to accept such an option, but did not discuss the voluntary separation package (which had no minimum age requirement) with employees too young to retire. He also commented that Conover was set in his ways and too comfortable in his position, while characterizing Meuser, who was substantially younger than Conover, as "aggressive," "innovative," and "showing initiative."

Human Resources conducted an adverse impact review of the employees targeted for termination in the reduction in force prior to its implementation in August, 1993. Although the statistics did not reveal an adverse impact on employees over 40 within the company as a whole, two divisions did show an adverse impact on older employees. The Human Resources Manager for Fluor Daniel, Esther Hodge, then met with the managers of those two divisions, Acquisitions and Finance (Conover's division) and Administration to review the process for potential age discrimination. She did not, however, personally review individual termination

decisions for age bias, nor did she instruct the division managers to do so. Ms. Hodge merely confirmed that the division had followed the "forced ranking" process to select employees for termination.

A report by the Inspector General ("I.G.") of the United States Department of Energy, issued after a 1995 audit of the reduction in force process, concluded that Respondents did not reduce staffing levels or improve the mix of worker skills following the August, 1993 reduction in force. The I.G. further determined that FERMCO terminated employees with needed skills, and hired new employees to replace those terminated. In particular, the I.G. found that by September 30, 1994 (one year after the reduction in force), all but 14 of the approximately 255 employees who had been separated in August 1993 (both voluntarily and involuntarily) had been rehired or replaced by employees with similar skills. The I.G. was critical not only of the ineffectiveness of the reduction in force, but also that Respondents spent almost $3 million to accomplish it.

With respect to the procurement group alone, FERMCO continued hiring buyers and supervisors immediately after the reduction in force. In fact, that organization separated five employees but hired thirteen more between August, 1993 and September 1994. Conover would have been qualified to perform all but one of those jobs. Instead, FERMCO hired several external candidates and employees who had held temporary positions previously. FERMCO never contacted Conover with respect to his interest in any of these positions.

ARGUMENT

I. SHOULD AN AGE DISCRIMINATION PLAINTIFF WHO ESTABLISHED A PRIMA FACIE CASE AND PRETEXT AT TRIAL BE REQUIRED TO PRESENT ADDITIONAL EVIDENCE THAT HIS AGE WAS THE REASON FOR HIS DISCHARGE IN ORDER TO SUPPORT A JURY VERDICT IN HIS FAVOR?

A. There is a direct conflict among the Circuit Courts of Appeals regarding whether a discrimination plaintiff after Hicks must present additional evidence of discrimination after establishing a prima facie case and pretext in order to support a jury verdict in his favor.

In McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), this Court established a framework for presenting circumstantial evidence of discrimination in Title VII disparate treatment cases. While these two decisions spelled out the respective burdens of the parties in Title VII cases (which was later applied in similar fashion to cases under the Age Discrimination in Employment Act and the Americans with Disabilities Act), neither offered specific guidance regarding the quantum of evidence a plaintiff needs to ensure that the ultimate issue of discrimination is presented to the fact-finder. In addition, neither case established the legal result when a plaintiff proves only a prima facie case and that the employer's articulated reason for the adverse employment action is not credible.

These questions were partially answered in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). Hicks held that judgment as a matter of law for the plaintiff is not mandated when the fact-finder concludes that the plaintiff established a prima facie case and then rejects the defendant's proffered reasons for its actions. Id. at 511. This Court stated:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is required."

Id.

While this language clearly seems to permit a factfinder to infer that unlawful discrimination occurred based only upon the prima facie and pretext evidence, courts and commentators alike have disagreed on the interpretation of this and other passages in Hicks, shifting the pre-Hicks "pretext only"[6] v. "pretext plus"[7] split to the "pretext

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6 "Pretext only" is the standard that requires that judgment for plaintiff as a matter of law be entered when plaintiff has proved a prima facie case and that the employer's proffered reason is pretextual. Kline v. Tennessee Valley Authority, 128 F.3d 337, 343 (6th Cir. 1997).

plus" v. "permissive pretext only"[8] debate. See e.g. Kline v. Tennessee Valley Authority, 128 F.3d 337, 343-44, 347 (6th Cir. 1997) (analyzing both positions and concluding that Hicks teaches the "permissive pretext only" approach); Aka v. Washington Hosp. Ctr., 116 F.3d 876, 880-85 (D.C.Cir. 1997) (noting cases on both sides of debate and reading Hicks as requiring the "permissive pretext only" approach), aff'd en banc, 156 F.3d 1284 (1998). See also Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 Mich. L. Rev. 2229, 2305, 2311 (1995) (commenting that "Hicks has left the courts in complete disarray as to what the plaintiff needs to do to prove pretext"); Anna Laurie Bryant & Richard A. Bales, Using the Same Actor "Inference" In Employment Discrimination Cases, 1999 Utah L. Rev. 255 (1999) ("The Hicks Court firmly rejected the pretext-only approach, but did not conclusively adopt either of the two remaining ["permissive pretext only" or "pretext plus"] approaches."); David Culp, Age Discrimination In Employment Act: Life After St. Mary's Honor Center v. Hicks--Rolling The Dice Against A Stacked Deck, 36 Duq. L. Rev. 795 (1998) ("federal courts . . . have struggled with the interpretation and workability of [the Hicks] decision"); R. Alexander Acosta & Eric J.Von Vorys, Bursting Bubbles and Burdens Of Proof: The

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[7] "Pretext plus" refers to the standard that requires that plaintiff present additional evidence of discrimination in addition to proving a prima facie case and pretext. Kline, 128 F.3d at 343.

[8] "Permissive pretext only" is the standard that permits, but does not require, the factfinder to infer discrimination from only evidence of plaintiff's prima facie case and pretext. Kline, 128 F.3d at 343.

Deepening Disagreement On The Summary Judgment Standard In Disparate Treatment Employment Discrimination Cases, 2 Tex. Rev. L. & Pol. 207, 217-22 (1998) (ambiguity in Hicks created circuit split); Michael J. Lambert, Comment, St. Mary's Honor Center v. Hicks: The "Pretext-Maybe" Approach, 29 New Eng. L. Rev. 163, 200-206 (1994) ("there has been neither uniform application nor general acceptance of the [Hicks] ruling by lower courts, commentators, and lawmakers"); Jody H. Odell, Comment, Between Pretext Only And Pretext Plus: Understanding St. Mary's Honor Center v. Hicks And Its Application To Summary Judgment, 69 Notre Dame L. Rev. 1251, 1253,1267-76 (1994) (noting two possible readings of Hicks and discussing judicial and EEOC interpretations); Victoria A. Cundiff & Ann E. Chaitovitz, St. Mary's Honor Center v. Hicks: Lots of Sound And Fury, But What Does It Signify? 19 Employee Rel. L.J. No. 3 at 147 (1993-94) (characterizing Hicks as adopting a pretext-plus rule); Barbara Lindemann & Paul Grossman, Employment Discrimination Law, 24-27, 1998 Supp. at 10-13 (3d ed. 1996) (the Hicks opinion created confusion, collecting cases).

In applying Hicks, several of the Federal Circuit Courts of Appeals have given the above quoted passage in Hicks its plain meaning and explicitly adopted the "permissive pretext only" approach. Other Circuits rejected outright "permissive pretext only" and adopted the "pretext plus" approach. Still other Circuits have taken the position that, in some (undefined) cases, "pretext plus" may be required. Moreover, several Circuits have split internally among these positions.

The Third Circuit, sitting en banc, discussed exhaustively "the quantum and nature of evidence that will

permit a jury to find that an employer engaged in impermissible employment discrimination" in Sheridan v. E.I.Dupont de Nemours & Co., 100 F.3d 1061, 1066-72 (3d Cir. 1996) (en banc), cert. denied, 521 U.S. 1129 (1997). After examining the language in Hicks pertaining to what is required for the jury to draw an inference of discrimination, along with the interpretation of Hicks by most other circuits, the Sheridan court concluded that a plaintiff need *only* establish a prima facie case, and evidence casting "sufficient doubt" upon the employer's proffered reasons to survive summary judgment and judgment as a matter of law. Id. at 1071. Once a discrimination plaintiff has met this burden, the question of discrimination "must remain within the province of the jury, because a finding of discrimination is at bottom a determination of intent." Id.

Joining the Third Circuit in this view are the Seventh, Ninth, and Tenth Circuit Courts of Appeals. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994) (to defeat summary judgment, plaintiff "must only 'produce evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for his dismissal") (quoting Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990)); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997); Washington v. Garrett, 10 F. 3d 1421, 1432 (9th Cir. 1993) ("If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed."); Nidds v. Schindler Elevator Corp., 113. F.3d 912, 918 (9th Cir.), cert. denied, 522 U.S. 950 (1997); Randle v. City of Aurora, 69 F.3d 441, 451, 452 n.17 (10th Cir. 1995) ("a jury may find illegal discrimination upon nothing more than a prima facie case and

pretext") (overruling prior inconsistent cases); Barbour v. Merrill, 48 F.3d 1270, 1276 (D.C. Cir. 1995), cert. dismissed, 516 U.S. 1155 (1996). In addition, the Equal Employment Opportunity Commission interpreted Hicks as requiring courts to submit the ultimate issue of discrimination to the factfinder when the Commission establishes a prima facie case and evidence that the employer's articulated motive is not credible. EEOC: Enforcement Guidance on St. Mary's Honor Center v. Hicks, [8 FEP Man.] Lab. Rel. Rep. (BNA) 405:7175, 7177 n.3, 7178 (1994) (concluding that Hicks rejected the "pretext plus" standard and that it allows a factfinder to infer discrimination from a showing that defendant's stated motive is untrue); EEOC:General Counsel's Memorandum on Supreme Court's Hicks Decision, [8 FEP Man.] Lab. Rel. Rep. (BNA) 405:7151, 7153 (1994) (reading Hicks as adopting the "permissive pretext only" rule while recognizing that some may interpret Hicks as adopting the "pretext plus" approach).

At the opposite end of the spectrum, the Fourth Circuit has explicitly held that the "pretext plus" rule is the standard in that circuit. That court held in Vaughan v. The Metrahealth Cos., Inc., 145 F.3d 197, 201-202 (4th Cir. 1998) that the plaintiff failed to meet her burden of proof despite establishing a prima facie case and raising a genuine dispute over the credibility of the employer's explanation. The Vaughan court specifically noted, after a brief analysis of Hicks, that "'pretext plus' is a better approach than 'pretext only.'" Id. at 202. The Fourth Circuit affirmed this rule in Gillins v. Berkeley Elec. Coop., 148 F.3d 413, 416 (4th Cir. 1998) ("[t]his court has adopted what is best described as the 'pretext plus' standard").

The First, Fifth and District of Columbia Circuits have

adopted a hybrid of the "pretext plus" and "permissive pretext only" standards. These courts have held that *sometimes* a plaintiff must produce additional evidence of discrimination beyond the evidence establishing the prima facie case and that defendant's proffered reasons were untrue in order to support a jury verdict. In Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993-94 (5th Cir. 1996) (en banc), the court noted that, "[i]n tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reason will often, perhaps usually, permit a finding of discrimination without additional evidence." Id. at 994. The court went on to say, however, that in some cases such evidence would not be enough to sustain a jury inference of discrimination. Id. In such cases, plaintiffs must introduce additional evidence of discriminatory intent after proving the employer's stated reasons untrue to support a favorable jury verdict. Id. at 994-995. This rule was applied in Grimes v. Texas Dept. of Mental Health & Mental Retardation, 102 F.3d 137, 143 (5th Cir. 1996), where the court ruled that plaintiff cannot survive summary judgment despite establishing a prima facie case and evidence that the employer's proffered justifications were not credible. The court required the plaintiff to present additional evidence that racial or retaliatory animus actually motivated the employer. Id.

The First Circuit has also adopted this interpretation of Hicks. In LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993), cert. denied, 511 U.S. 1018 (1994), the court noted that "[i]n this circuit, we have always required not only 'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus." The court affirmed summary judgment for the employer despite assuming that the prima

facie case had been established because it concluded that no rational jury could find that the employer was motivated by age animus when it terminated the plaintiff. Id. at 849. Another panel of the First Circuit reached the same conclusion in Woods v. Friction Materials, Inc., 30 F.3d 255, 262 (1st Cir. 1994). The Woods court noted its disagreement with the EEOC regarding the proper interpretation of Hicks. 30 F.3d at 261 n.3. It concluded that the Hicks Court did not mean that all cases in which plaintiff established a prima facie case along with disbelief of the employer's stated justifications would be strong enough to sustain a jury verdict in plaintiff's favor. Id. See also Barbour v. Dynamics Research Corp., 63 F.3d 32, 39 (1st Cir. 1995), cert. denied, 516 U.S. 1113 (1996).

Similarly, the District of Columbia Circuit concluded, in an en banc decision, that there may be situations where evidence of only a prima facie case and rebutting the employer's explanation do not suffice to create a jury question on the ultimate question of discrimination. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1292 (D.C. Cir. 1998) (en banc). This decision overruled the earlier panel's analysis in the same case (although it reached the same result), which had concluded that "when presented with sufficient evidence to find both that the plaintiff has made a prima facie case and that the employer's proffered nondiscriminatory reasons for the challenged actions were not credible, the factfinder can properly find that the defendant employer has intentionally discriminated against the plaintiff." Aka v. Washington Hosp. Ctr., 116 F.3d 876, 881 (D.C. Cir. 1997).

The remaining Circuit Courts of Appeals (the Second, Sixth, Eighth and Eleventh) are struggling with intra-circuit

splits among these different positions. For instance, the Second Circuit in E.E.O.C. v. Ethan Allen Inc., 44 F.3d 116, 120 (2d Cir. 1994) vacated judgment as a matter of law granted to the defendants because the plaintiff had presented sufficient evidence to permit the fact-finder to reject the employers' articulated reason for discharging the plaintiff. That panel found that "[w]hile the evidence presented by Ethan Allen might well demonstrate that Pierce was terminated for reasons not related to age, this is a question better left for the jury to resolve." Id. This panel, then, followed the "permissive pretext only" approach. The panel in Binder v. Long Island Lighting Co., 57 F.3d 193, 200 (2d Cir. 1995) applied the same rule. However, the entire Second Circuit, sitting en banc, held that a "finding of pretext, together with the evidence comprising a prima facie case, is not always sufficient to sustain an ultimate finding of intentional discrimination." Fisher v. Vassar College, 114 F.3d 1332, 1338 (2d Cir. 1997) (en banc) (holding 6-5 that a finding of pretext and the establishment of a prima facie case does not bar appellate review for clear error, while acknowledging that Hicks could be read to say that appellate review for clear error is precluded in such cases), cert. denied, 522 U.S. 1075 (1998). The Second Circuit overruled the Binder decision to the extent that it could be interpreted to preclude appellate review of a finding of discrimination supported by a prima facie case and evidence of pretext. Id. at 1332. However, it did not overrule the Ethan Allen decision, leaving confusion as to whether the standard in that circuit is the "permissive pretext only" or "pretext plus (sometimes)" rule.

The Eighth Circuit initially adopted the "permissive pretext only" rule in Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1110 (8th Cir.) ("if (1) the elements of

a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and *we are without power to reverse the jury's finding*") (emphasis added), cert. denied, 513 U.S. 946 (1994). Krenik v. County of Le Sueur, 47 F.3d 953, 958-59 (8th Cir. 1995) followed this rule. A different panel, however, preferred the "pretext plus sometimes" rule. Rothmeier v. Investment Advisors, Inc., 85 F.3d 1328, 1333, 1336 (8th Cir. 1995) (noting that "[p]ost-Hicks, our Circuit's pronouncements on this issue have not been models of apparent consistency," discussing cases). The Eighth Circuit, sitting en banc in Ryther v. KARE 11, 108 F.3d 832, 837-38, 838 n.2 (8th Cir.), cert. denied, 521 U.S. 1119 (1997), confused the issue further by explicitly adopting the same standard as the Third Circuit's Sheridan decision (which adopted "permissive pretext only," see supra pp. 14-15), then stating in a footnote that "evidence of pretext does not always support an inference of intentional discrimination." The courts within the Eighth Circuit are left to wonder whether the rule in that circuit is the "permissive pretext only" or the "pretext plus sometimes" standard.

The Eleventh Circuit is in similar disarray. In fact, the court in Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996) (per curiam), cert. denied, 521 U.S. 1119 (1997), acknowledged that "[s]ome confusion exists in the law of this circuit about whether Hicks always precludes judgment as a matter of law for employers whenever there is a plausible basis on which to disbelieve the employer's proffered reason for the employment decision in question." Id. at 442 (citing Howard v. BP Oil Co., 32 F.3d 520, 527 (11th Cir. 1994) (applying "permissive pretext

only" rule) and Walker v. Nationsbank, 53 F.3d 1548 (11th Cir. 1995) (affirming directed verdict for defendant despite proof of prima facie case and pretext)). The Isenbergh court then applied the "pretext plus sometimes" standard, affirming the district court's grant of judgment as a matter of law to defendant after a jury verdict in favor of the plaintiff. 97 F.3d at 442 ("In our view, Hicks, taken as a whole, more likely supports a different conclusion: in such circumstances, the watchword would be not 'every time,' but 'sometimes.'"). Another panel of the Eleventh Circuit tried to dispel the confusion in Combs v. Meadowcraft, Inc., 106 F.3d 1519, 1529 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998). That court concluded that Hicks clearly teaches that disbelief of the employer's articulated reasons, coupled with the prima facie case, is sufficient to support a finding of discrimination. Id. The Combs panel then described the Walker decision as a "mistake," id. at 1532, and rationalized away the Isenbergh decision by pointing out that the actual decision was in harmony with Howard, despite its criticism of Howard's "permissive pretext only" standard. Id. at 1533. The Combs court, therefore, has only added to the confusion within the Eleventh Circuit.

The Sixth Circuit has also interpreted Hicks in different ways since that 1993 decision. In Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1083-84 (6th Cir. 1994), the court noted that Hicks clearly stated that an inference of discrimination is permitted from the plaintiff's prima facie case and a "suspicion of mendacity." Id. at 1084. However, the court then noted that there were three ways to establish pretext:

> (1) that the proffered reasons had no basis in fact,
> (2) that the proffered reasons did not actually

motivate the discharge, or
(3) that they were insufficient to motivate the discharge.

Id. Under the second method, the Manzer court required evidence of discrimination in addition to that presented under the prima facie case and pretext, but did not require such additional evidence when proving pretext under the first or third methods. Id. In effect, then, the Sixth Circuit adopted the "pretext plus sometimes" standard in Manzer. Another panel, without reference to Manzer, reversed the district court's entry of summary judgment for the defendant because the plaintiff had established a prima facie case and produced evidence from which a jury could find that the defendant's proffered reasons were false. Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226-27 (6th Cir. 1996). The Ensley-Gaines court ignored Manzer and interpreted Hicks as mandating application of the "permissive pretext only" rule. The EEOC v. Yenkin-Majestic Paint Corp., 112 F.3d 831, 835 (6th Cir. 1997) court followed this "permissive pretext only" rule, this time citing Manzer *and* Hicks as support.

Later that year, the Sixth Circuit conducted an in-depth analysis of the "pretext only," "permissive pretext only," and "pretext plus" standards under Hicks. Kline v. Tennessee Valley Authority, 128 F.3d 337, 342-47 (6th Cir. 1997). After reviewing this Court's decision in Hicks, the Kline court concluded that the plain language of Hicks rejected the "pretext plus" position. Id. at 344. Relying on a series of cases from other circuits, the court concluded that the appropriate standard was the "permissive pretext only" rule. Id. at 347. The court made clear that the finding of intentional discrimination is a *question for the jury*, once the plaintiff's prima facie case and the falseness of the

employer's justifications were established. Id. at 347.

Although the Sixth Circuit had rejected a "pretext plus" position in Kline, its decision in the case at hand is contrary to Kline and confuses rather than clarifies the application of Hicks. Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 422-23 (6th Cir. 1999). Despite noting that after Hicks "the elements of the prima facie case, together with the jury's disbelief of the employer's explanation for its actions, *are sufficient to support a verdict for the employee*," the Court nevertheless applied a "pretext plus" standard and reversed the jury verdict for Petitioner. Id. at 421-23. In reversing the jury verdict, however, the court admitted that Petitioner established a prima facie case of age discrimination, and also recognized that he had introduced evidence discrediting Defendants' explanations. Id. at 422. The court noted that "St. Mary's permits an inference of discrimination when a plaintiff has made out a prima facie case and the employer's explanation of its action makes no sense. It does not, however, permit an inference of discrimination merely because the explanation makes no sense and the plaintiff is a member of a protected class." Id.

This language indicates that the court concluded Petitioner had failed to establish a prima facie case, and reversed the jury verdict accordingly. However, the opinion in the next paragraph acknowledges that Petitioner *did* establish his prima facie case by proving that he was treated differently than two employees who were substantially younger than he was. Id. Therefore, the court's later discussion of the "weakness" of Petitioner's evidence of age discrimination can only mean that the court required evidence of age discrimination in addition to a prima facie case and

evidence that "the employer's explanation of its action makes no sense," and reversed a jury's finding that Petitioner had proved willful age discrimination. This ruling is contrary to this Court's decision in Hicks.

This Court should grant a Writ of Certiorari to resolve the confusion among the Circuit Courts of Appeals with regard to whether juries in discrimination cases are permitted to infer discrimination from only evidence that the employer's explanations are pretextual coupled with the prima facie case.

B. The decision below implicates the Seventh Amendment and raises important questions regarding a discrimination plaintiff's ability to present his case to the fact-finder.

When the Sixth Circuit reversed Petitioner's Age Discrimination claim, with instructions to enter judgment for Defendants, it usurped the role of the jury as factfinder. In doing so, it violated Conover's Seventh Amendment[9] right to a jury trial. See Lorillard v. Pons, 434 U.S. 575 (1978).

The Seventh Amendment preserves an important and valuable right: "the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political

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[9] The Seventh Amendment to the United States Constitution provides "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States. . . ."

and civil liberty." J. Story, Commentaries on the Constitution of the United States 1762 (1833). Its primary purpose is to distinguish between issues of law, to be resolved by the court, and issues of fact, which are to be determined by the jury. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935).

In St. Mary's Honor Ctr. v. Hicks, this Court envisioned that the ultimate issue of whether an employer had engaged in prohibited discrimination, once a discrimination plaintiff had established a prima facie case and evidence of pretext, was a question of fact that must be resolved by the jury. 509 U.S. 502, 511 (1993) ("the trier of fact proceeds to decide the ultimate question" as soon as the plaintiff establishes a prima facie case and the defendant rebuts the presumption by articulating its explanation for the adverse action). Thus, when a plaintiff has produced evidence sufficient to discredit the employer's explanations for its action, then the jury *may*, based on this evidence of pretext coupled with the evidence used to establish the prima facie case, infer that discrimination occurred. Id. Although Hicks was not a Seventh Amendment case,[10] this Court implicitly recognized that it would be improper for a reviewing court to enter judgment as a matter of law for the defendant when a plaintiff proved pretext and a prima facie case, by explicitly holding that entering judgment as a matter of law for the *plaintiff* in that situation was improper. Id.

In this case, Petitioner presented ample evidence to

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[10] Hicks was tried to a judge as factfinder because the Civil Rights Act of 1991, which provided for jury trials of Title VII claims, had not yet been passed at the time of trial. 509 U.S. at 505.

support the jury's verdict, including (as the Sixth Circuit acknowledged) establishing a prima facie case and presenting substantial evidence of pretext. The jury which heard this evidence was in a better position than the appellate court to sift through all the evidence and reach a reasonable resolution of the issues of fact presented. The fact that the jury found for two Plaintiffs *and* against two Plaintiffs in this case on their age discrimination claims is striking evidence of the reasonableness of the jury's deliberations. Further evidence that this claim was properly submitted to the jury is the trial court's denial of motions for summary judgment, directed verdict, and judgment notwithstanding the verdict. In this situation, the Sixth Circuit Court of Appeals had "no power to snatch away from the factfinder crucial factual determinations that it is expressly permitted to make." Aka v. Washington Hosp. Ctr., 116 F.3d 876, 880-85 (D.C.Cir. 1997) (citing United States v. General Motors Corp., 518 F.2d 420, 441 (D.C. Cir. 1975) ("Litigants may not be cut off from their right to trial 'if they have issues to try.'") (quoting Sartor v. Arkansas Natural Gas Corp. 321 U.S. 620, 627 (1944))), aff'd en banc, 156 F.3d 1284 (1998).

This Court should grant Certiorari in this case to clarify that, in cases where discrimination plaintiffs have produced evidence of a prima facie case and pretext, a jury question is created, which is protected by the Seventh Amendment. The resulting jury verdict, therefore, should not be disturbed by reviewing courts, absent juror misconduct. Misinterpretation of this standard by lower courts has resulted in the Seventh Amendment rights of discrimination plaintiffs being trampled. See, e.g. Combs v. Meadowcraft, Inc., 106 F.3d 1519, 1529 (11th Cir. 1997) (reversing judgment for plaintiff entered after jury verdict finding for plaintiff), cert. denied, 522 U.S. 1045 (1998); Isenbergh v. Knight-Ridder

Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996) (per curiam) (affirming grant of judgment as a matter of law which reversed a jury verdict in plaintiff's favor), cert. denied, 521 U.S. 1119 (1997).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. Opinion of the Sixth Circuit Court Of Appeals, whose decision is sought to be reviewed, filed May 19, 1999.

2. Order of the District Court for the Southern District of Ohio, filed March 24, 1997.

3. Order of the Sixth Circuit Court Of Appeals denying rehearing en banc, filed July 21, 1999.

[178 F.3d 414]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT J. SKALKA; JOSEPH L. BALNITES, SR.; WILLIAM E. PONSOCK; CHARLES D. CONOVER, III, Plaintiffs-Appellees (97-3493; 98-3123),

CHARLES D. CONOVER, III, Plaintiff-Appellee/Cross-Appellant (98-3122)

v.

FERNALD ENVIRONMENTAL RESTORATION MANAGEMENT CORPORATION; FLUOR DANIEL, INC., Defendants-Appellants (97-3493; 98-3123)/ Cross-Appellees (98-3122).

Nos. 97-3493, 98-3122/98-3123

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 94-00568 Herman J. Weber, District Judge.

Argued: January 29, 1999

Decided and Filed: May 19, 1999

Before: MERRITT, GUY, and MOORE, Circuit Judges.

ARGUED: Doreen Canton, TAFT, STETTINIUS & HOLLISTER, Cincinnati, Ohio, for Appellants.

Randolph H. Freking, FREKING & BETZ, Cincinnati, Ohio, for Appellees.

ON BRIEF: Doreen Canton, Caleb E. Nelson, Robert G. Stachler, TAFT, STETTINIUS & HOLLISTER, Cincinnati, Ohio, Daniel G. Rosenthal, DENLINGER, ROSENTHAL & GREENBERG, Cincinnati, Ohio, for Appellants.

Randolph H. Freking, FREKING & BETZ, Cincinnati, Ohio, for Appellees.

OPINION

KAREN NELSON MOORE, Circuit Judge. Robert Skalka, Joseph Balnites, William Ponsock, and Charles Conover sued their former employer, Fernald Environmental Restoration Management Corporation ("FERMCO"), and its parent company, Fluor Daniel, Inc., for age discrimination and breach of contract. A jury found for Skalka and Conover on the age discrimination claim and for all four plaintiffs on the breach of contract claim. The jury also awarded substantial damages. The district court accepted the jury's verdict except for the finding in favor of Conover on the breach of contract claim, and the court entered judgment accordingly.

FERMCO appeals, arguing that virtually all of the

jury's decisions on liability and damages were not supported by sufficient evidence. Conover cross-appeals on the breach of contract claim. We AFFIRM the age-discrimination judgment for Skalka and REVERSE the age-discrimination judgment for Conover. We AFFIRM the contract judgment against Conover and REVERSE the contract judgments for the rest of the plaintiffs. We also conclude that there were errors in the plaintiffs' favor in the calculation of damages, and, therefore, we must REMAND this case so the district court can determine an appropriate remittitur, and, in the event of Skalka's failure to remit the amount determined, order a new trial on the issue of damages.

I. BACKGROUND

The four plaintiffs in this case worked at a site owned by the federal government in Hamilton County, Ohio, where various contractors once produced uranium and others now clean up the waste. FERMCO took over clean-up responsibilities in December 1992, expecting to spend about fifteen years on the project. The following August it laid off approximately 120 salaried employees (and sixty more who left voluntarily). According to an Inspector General's report, this reduction in force was inefficient and did not substantially reduce the workforce, since many of the discharged employees were eventually replaced. FERMCO attributes some of the problems criticized by the Inspector General to the vagaries of the budget process and to the large sums it spent on severance packages in order to accomplish the reduction in force. The plaintiffs imply that such a blatantly ineffective "reduction" in force must have been a pretext for getting rid of unwanted employees.

When it decided to reduce its workforce, FERMCO

developed a "forced ranking" process to decide whom to lay off. Employees were classified into "peer groups," and supervisors for each group evaluated their subordinates on various skills in order to produce a ranked list. Top management officials decided which departments would lose employees, and the manager of each department used the forced rankings to decide which employees would go. FERMCO assured its employees that the selection process would be fair and objective, that the company would try to find new jobs for people, and that an appeals process would provide for meaningful review of the decision to terminate any particular employee.

At the time of the layoffs, Skalka was 54 years old and had several years of experience at the site. He worked in the Remedial Support Operations Group ("RSO"), and he reported to Timothy Huey. His peer group included four other RSO representatives ("RSOs") who reported to Huey; the others were all younger than Skalka. Although they were classified together, the RSOs worked in separate parts of FERMCO, each providing support services to a particular department. By the time of this litigation, FERMCO claimed to have lost the rating forms for the rest of Skalka's peer group. However, Skalka received a near-perfect score (4.74 out of 5.0), and his score was better than Jim Golden's. J.A. at 499, 502. n1

n1 The plaintiffs assert, without citation, that Skalka had the highest score and Golden the lowest. We note that the plaintiffs' statement of the facts, which is over seven pages long, contains exactly two citations to the record. This paucity of record and Joint Appendix citations fails to comply with our rules, see FED. R. APP. P. 28(a)(7) & (9) (formerly FED. R.

APP. P. 28(a)(4) & (6)), and unnecessarily complicates our job on review.

Despite Skalka's superior rating and performance, he was laid off because the department to which he had been assigned no longer needed an RSO. No other RSOs in his peer group were laid off. Skalka claims that the RSO with the lowest rating should have been laid off and that he should have been moved to that person's position. He notes that a year later, when the RSO position was eliminated entirely, FERMCO transferred the four younger employees to other jobs.

FERMCO responds that Huey was responsible for ranking Skalka's peer group only because he was above them in the organizational hierarchy. He actually knew little or nothing about their performance, so FERMCO did not base any decisions on his rankings. In addition, Skalka may have anticipated the elimination of his position, since he worked on his resume before the layoffs were announced.

Conover also had several years of experience at the FERMCO site and was 47 at the time of the layoffs. He introduced some testimony that he did a good job, but he was ranked last in his five-person peer group. Two members of the group were older than he was: Donald Liepold was 48, almost 49; Paul Simons was 47 but a few months older than Conover; Eric Meuser was 40; and Paul Sturgeon was 35. J.A. at 313-16, 701-02. The group was ranked by Gwen Nalls and Louis Henke. Among a number of irregularities in the rating process were numerous mathematical and typographical errors on this peer group's rating forms. However, it appears that the only errors that actually affected the scores were in Conover's favor.

Conover claims that Henke selectively solicited older employees for "voluntary" termination. He also claims that Henke is somehow implicated in another manager's statement that some employees would be laid off because they were "too comfortable" in their jobs. Skalka Br. at 5. Conover argues that he should have been retained instead of several younger employees, including his peer group and his subordinates.

Ponsock and Balnites were also laid off after being ranked at the bottoms of their peer groups.

Ponsock, Balnites, and Skalka all filed internal appeals of their terminations. They allege that the appeals process was a sham, consisted only of asking each appellant's manager if correct procedures were followed, and did not result in overturning any layoff decisions.

FERMCO conducted a statistical study of the effects of the layoffs, and a preliminary report found "borderline" results in certain divisions, including Conover's and Balnites's, indicating a possible disparate impact on older workers. J.A. at 466-68. FERMCO's expert witness testified that, upon further investigation, the result was found not to be statistically significant. J.A. at 742-43. The plaintiffs criticize this conclusion because it was based on the assumption that all groups should be equally affected, while they assert that older workers, because of their greater experience, should have been disproportionately unaffected by the layoffs. They offer FERMCO's failure to follow up on this statistical red flag as evidence that the company's violations of the Age Discrimination in Employment Act ("ADEA") were willful.

All four plaintiffs claim that FERMCO discriminated on the basis of age, in violation of state and federal law, and that FERMCO is liable for breach of contract and/or promissory estoppel for breaking its promise that the layoff procedures would be fair and allow for meaningful review. The contract claim and the federal discrimination claim were tried to a jury, which found that FERMCO had discriminated against Skalka and Conover and awarded them back pay and front pay. Because the jury also found that the violations were willful, the back-pay award was doubled. Although the jury rejected Ponsock's and Balnites's age discrimination claims, it found for all plaintiffs on their contract/promissory estoppel claims and awarded damages. With some complications discussed below, the district court eventually entered judgment in accordance with the jury's verdict, except that it granted FERMCO's motion for judgment on Conover's contract claim because he had failed to pursue an internal appeal of his termination.

FERMCO appeals, claiming that there was insufficient evidence to support the findings of liability, and insufficient evidence that any violations of the ADEA were willful. It also has several complaints about the damages calculations.

Conover cross-appeals the judgment notwithstanding the verdict on his contract claim.

II. ANALYSIS

A. AGE DISCRIMINATION

A prima facie case of age discrimination consists of four elements: (1) the plaintiff was a member of the protected class, which is people at least forty years old; (2) he or she

was discharged; (3) he or she was qualified for the position; and (4) he or she was replaced by a younger person. See *Phelps v. Yale Security, Inc., 986 F.2d 1020, 1023* (6th Cir.), cert. denied, *510 U.S. 861, 126 L. Ed. 2d 135, 114 S. Ct. 175 (1993).* In the context of a reduction in force, the fourth requirement is modified to require the plaintiff to offer some "direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Barnes v. GenCorp Inc., 896 F.2d 1457, 1465* (6th Cir.), cert. denied, *498 U.S. 878, 112 L. Ed. 2d 171, 111 S. Ct. 211 (1990)).* This evidence may include "showing that persons outside the protected class were retained in the same position." *EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992)* (internal quotation omitted).

After a jury verdict, the burden-shifting framework falls away. The question for the court is simply whether there was sufficient evidence to support a finding of age discrimination. See *Simpson v. Midland-Ross Corp., 823 F.2d 937, 942 (6th Cir. 1987).* However, the elements of that framework remain useful ways of thinking about the evidence and how the jury might reasonably have arrived at its verdict. For example, the elements of the prima facie case, together with the jury's disbelief of the employer's explanation for its actions, are sufficient to support a verdict for the employee, although they do not compel such a verdict. See *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).*

(1) ADEA Violations

(a) Skalka

There was sufficient evidence for the jury to conclude that FERMCO discriminated against Skalka. Skalka was the oldest member of his peer group and was laid off despite being rated the most competent. FERMCO's explanations of this anomaly are (1) the ranking scores were not used in deciding which RSOs to eliminate because the supervisor who rated them did not actually know anything about their performance and (2) Skalka's elimination was not really part of the general layoffs because the department to which he had been assigned did not need an RSO.

The jury was entitled to reject the credibility of FERMCO's first explanation. FERMCO itself constructed the peer groups and assigned reviewers. If it is true that Huey was not qualified to rank the RSOs, then the jury may simply have taken that information as further evidence that FERMCO's "objective" system of layoffs was a sham. FERMCO relied on the integrity of its forced ranking procedures to justify laying off the other plaintiffs (and many other employees). The jury could understandably have been skeptical when FERMCO conveniently identified flaws in the process that produced Skalka's score.

To support its second argument, FERMCO cites our decisions holding that "no-bump" layoff policies and different treatment of differently situated employees generally are not sufficient to support an inference of discrimination. See *Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); Barnes, 896 F.2d at 1464-66.* Barnes held that the plaintiff's prima facie case is somewhat different in a case involving a workforce reduction. To justify an inference that "the most common legitimate reason" for termination was not the true reason, the plaintiff must present some evidence that the employer singled him or her out. See *Barnes, 896 F.2d at*

1465. Rather than showing that the plaintiff was replaced, "the fourth element [of the prima facie case] may be satisfied by showing that persons outside the protected class were retained in the same position or that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss the plaintiff." *Clay Printing, 955 F.2d at 941* (internal quotation omitted). The plaintiff cannot prevail merely by pointing to other positions for which she was qualified and claiming that the employer should have allowed her to "bump" the occupant of that position. See *Barnes, 896 F.2d at 1465;* see also *Mitchell, 964 F.2d at 583.* However, the employer cannot avoid liability by changing job titles or relying on minor differences in an attempt to argue that other employees did not have the "same" job. See *Barnes, 896 F.2d at 1465 n.10.*

In this case the jury could reasonably have concluded, as FERMCO would have had them do, that each RSO's job was unique, so that Skalka could not compare himself to the four other members of his peer group. However, this conclusion was not required, and again the jury may have been suspicious of the defendants' insistence that their own system for planning the layoffs was inappropriate for Skalka. Skalka and the other RSOs had the same title and the same supervisor. FERMCO determined that their jobs required the same skills when it assigned them to a single peer group. To say that an exception was warranted because Skalka's particular assignment was unnecessary is not a very convincing argument in the context of a large-scale layoff. If a company decides to eliminate scores of employees, it must necessarily decide that some jobs are unnecessary. The company could have chosen to structure the layoffs by identifying the least necessary jobs and eliminating their incumbents, as the employer did in Barnes. FERMCO,

however, chose to proceed on the basis of employee skills. The jury did not have to accept as credible its explanations of why it deviated from its own procedure in Skalka's case. Having concluded that FERMCO's reason for laying off Skalka was not worthy of belief and having heard evidence that FERMCO "lost" the peer group's ranking forms, deviated from its normal procedures, and fired the oldest and most qualified RSO, the jury was entitled to find that discrimination had occurred. See *St. Mary's, 509 U.S. at 511.*

(b) Conover

The jury also returned a verdict in favor of Conover on his age discrimination claim. Although Conover introduced what he claimed was evidence that Henke was age-biased, we can only attribute the verdict to confusion. Conover received the lowest score in his peer group, although he did introduce evidence at trial that he did a good job. He also introduced evidence of extreme carelessness with the ranking forms. As discussed above, St. Mary's permits an inference of discrimination when a plaintiff has made out a prima facie case and the employer's explanation of its action makes no sense. It does not, however, permit an inference of discrimination merely because the explanation makes no sense and the plaintiff is a member of a protected class. In permitting the inference of discrimination, St. Mary's assumed that the prima facie case had been satisfied -- in particular, that the plaintiff had been replaced by or otherwise treated differently from an employee outside the protected class. Regardless of whether Conover deserved to be fired, it is hard to see how the jury could infer age discrimination when he was younger than two of the four other people in his peer group.

Of course, Conover was treated differently from the two employees who were substantially younger than he was, and in practical terms he was the same age as Liepold and Simons. We do not suggest that a plaintiff cannot establish age discrimination when only one of several older employees is treated differently from younger employees. Indeed, Conover could make out a prima facie case by comparing himself to the younger members of the peer group. On the ultimate question of whether he has proven discrimination, however, Conover's evidence is too weak to sustain the verdict. It consists of (1) the fact that Henke discussed the possibility of early retirement with older employees but not younger ones, and two employees in their 50s accepted early retirement; (2) a statement by another supervisor that some employees would be laid off because they were "too comfortable"; and (3) the assertion "the oldest" of that supervisor's employees were laid off. Skalka Br. at 5. Conover somehow attributes facts (2) and (3) to Henke. These allegations are vague and are unsupported by citations to the record. In addition, we do not believe that the "comfortable" comment is indicative of age bias. See *Clay Printing, 955 F.2d at 942.*

Most problematic is that Conover relies heavily on the false assertion that he was the oldest member of his peer group. Skalka Br. at 18. Thus, Conover has not really provided any argument to support the verdict. The most likely explanation for it seems to be that the jury made the same mistake that Conover has made about the ages of his peers and, finding FERMCO's decision irrational and careless, inferred discrimination. We do not think that a reasonable jury could have reached this conclusion on the basis of the correct facts about Conover's age relative to his peer group.

(2) Willfulness

The ADEA provides for additional liquidated damages if an employer's violation of the Act is "willful." See *29 U.S.C. § 626*(b). As a result of the jury's finding of willfulness in this case, the district court doubled the back-pay awards. FERMCO argues that there was insufficient evidence to support the willfulness finding, even assuming a violation of the ADEA.

To find willfulness, the jury had to conclude by the preponderance of the evidence that FERMCO "either knew or showed reckless disregard for the matter of whether its conduct was prohibited" by the ADEA. *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 100 L. Ed. 2d 115, 108 S. Ct. 1677 (1988).* It is not enough to show that the employer knew that the ADEA was "in the picture" or that the employer "acted without a reasonable basis for believing that it was complying with the statute." *Id. at 132-34* (rejecting these two standards).

To demonstrate willfulness, the plaintiffs rely mostly on FERMCO's failure to follow up on the statistical survey indicating a possible disparate impact. That argument applies primarily to Conover, not Skalka, since Skalka's department was not one of the ones flagged by the survey. The plaintiffs also criticize FERMCO for "failing to take a proactive stance in preventing discrimination." Skalka Br. at 29. In addition, Skalka's discharge involved a dramatic departure from established company procedures and was therefore highly "visible" to top management. The jury could reasonably have concluded that FERMCO was aware that its oldest RSO was selected for a layoff through irregular procedures and that its failure to investigate and remedy the situation indicated

reckless disregard for whether its managers were making discriminatory decisions. We therefore conclude that there was sufficient evidence to support the jury's finding that FERMCO's discrimination against Skalka was willful.

B. CONTRACT/PROMISSORY ESTOPPEL

Ohio law does not support recovery for breach of contract or promissory estoppel in this situation. Ohio adheres to the doctrine that employment relationships are generally terminable at will but recognizes that an at-will relationship can be modified by contract or promissory estoppel. See *Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 483 N.E.2d 150, 153-55 (Ohio 1985);* see also *Wright v. Honda of America Mfg., Inc., 73 Ohio St. 3d 571, 653 N.E.2d 381, 386 (Ohio 1995)* (Pfeifer, J., concurring) (recognizing a "limited implied contract" based on employer's multiple assurances that employee would not be fired for violation of anti-nepotism policy). n2 However, an employer's general policy statements, such as would appear in an employee handbook, are usually not sufficient by themselves to create an implied contract of continued employment. See *Rudy v. Loral Defense Sys., 85 Ohio App. 3d 148, 619 N.E.2d 449, 452* (Ohio Ct. App.), cause dismissed, *612 N.E.2d 329 (Ohio 1993); Bartlett v. Daniel Drake Mem'l Hosp., 75 Ohio App. 3d 334, 599 N.E.2d 403, 406 (Ohio Ct. App. 1991).* Similarly, only a specific promise of job security -- not generalized praise of an employee's performance and prospects for advancement -- can give rise to estoppel. Compare *Helmick v. Cincinnati Word Processing, Inc., 45 Ohio St. 3d 131, 543 N.E.2d 1212, 1216-17 (Ohio 1989)* (holding that estoppel applied because employer made specific individual promises to dissuade employee from pursuing other opportunities), with *Wing v. Anchor Media, Ltd. of Texas, 59 Ohio St. 3d 108, 570 N.E.2d*

1095, 1098-99 (Ohio 1991) (holding that promises regarding "future benefits or opportunities" were not sufficient to constitute specific promises of continued employment), and *Anders v. Specialty Chem. Resources, Inc., 121 Ohio App. 3d 348, 700 N.E.2d 39, 41 (Ohio Ct. App. 1997)* (holding that "statements assuring [employee] of a 'secure future' and 'secure career'" did not "establish express or implied contracts or promissory estoppel"). In particular, assurances that the employer will be "fair" in its decisions do not constitute a specific guarantee of continued employment. See *Snyder v. Ag Trucking, Inc., 57 F.3d 484, 489 (6th Cir. 1995)* (holding that promises, including a statement that "'all employees are treated fairly,'" were "not sufficiently specific to induce reliance"); *Hanly v. Riverside Methodist Hosps., 78 Ohio App. 3d 73, 603 N.E.2d 1126, 1129 (Ohio Ct. App. 1991)* (holding that stated policy of being "'frank, fair and honest'" was not specific enough to create an implied contract).

> n2 In Ohio, the court's syllabus is generally the official statement of the holding of the case. See OHIO S. CT. R. FOR REPORTING OPS. 1. In this case, however, the syllabus does not discuss the issue of how an at-will employment relationship can be modified, and no opinion won the support of a majority of the court. We cite Justice Pfeifer's concurring opinion because it reached the result on narrower grounds than those relied on in the lead opinion.

Although FERMCO certainly wanted employees to believe that the layoff process would be fair, there were no specific promises of continued employment, even for people who were doing a good job. It would have been unreasonable

for any employee to treat a promise of fairness in the implementation of mass layoffs as an assurance of continued employment. One would not expect any employer to make layoff decisions randomly, and a good employer would want to explain its plans and methods to its employees. It would strive to be fair and objective, just as it would strive to be fair and objective in the hiring process, when there are often more strong applicants than there are positions. Permitting employees to sue over the outcome of the layoffs on the basis of such general statements by the employer would make virtually every large-scale layoff judicially reviewable. While parties may contract to limit the employer's ability to discharge, and compliance with the contract can ultimately be determined in court, we will not infer the existence of such a contract whenever an employer establishes a system for internal decision-making.

Because we reject the contract claims brought by all of the plaintiffs, we need not review the district court's additional reason for setting aside the verdict for Conover on this claim.

C. DAMAGES

The jury awarded Skalka $487,907 in back pay and $529,416 in front pay for his ADEA claim, as well as $225,000 for his contract claim. FERMCO has several complaints about these damages. As an initial matter, we reject its claim that the jury's decisions reflect "passion and prejudice." The jury found against the plaintiffs on two counts (Balnites's and Ponsock's ADEA claims), and by FERMCO's own arguments the inflated damages awards are the result of errors rather than unprincipled anger at FERMCO.

In the absence of undue passion and prejudice on the part of the jury, we review for abuse of discretion the district court's refusal to grant a new trial based on excessive damages or a remittitur. See *Roush v. KFC Nat'l Mngmnt. Co., 10 F.3d 392, 397 (6th Cir. 1993)*, cert. denied, *513 U.S. 808, 130 L. Ed. 2d 15, 115 S. Ct. 56 (1994)*. A verdict is not excessive unless it exceeds "'the maximum that a jury could reasonably find to be compensatory' for the plaintiff's loss." Id. (quoting *In re Lewis, 845 F.2d 624, 635 (6th Cir. 1988))*. Here, the district court refused to reduce the damages because the plaintiffs were able to offer a "tenable" explanation for the amounts. J.A. at 118 (3/24/97 Order) (relying on plaintiffs' calculations at J.A. 87-89). As FERMCO demonstrates in its brief, the jury clearly arrived at Skalka's back-pay figure by adding the stipulated amounts of salary and non-pension benefits to his projected pension without accounting for the amounts Skalka had received in early retirement benefits and in income from other employment. The plaintiffs' explanation for the damages incorporated the jury's clearest error, the failure to discount future pension benefits to present value. We therefore find it necessary to remand for the district court to calculate an appropriate remittitur and, if necessary, hold a retrial on the damages issue.

(1) Pension Benefits as Part of Back Pay

Over half of Skalka's "back-pay" award was compensation for pension benefits he eventually would have received if he had stayed at FERMCO until retirement. FERMCO argues that, by definition, payments expected in the future cannot be part of back pay. n3 The plaintiffs do not attempt to defend the inclusion of future payments in the back pay award, arguing only that FERMCO failed to object to

jury instructions that defined back pay as including "pension benefits which a plaintiff would have received had the discrimination not occurred." J.A. at 796. FERMCO responds that the parties intended this to refer only to 401(k) payments that would have been made during the time before the trial.

n3 This issue is important to FERMCO because the back-pay award but not the front-pay award is doubled when the jury finds that the defendant's violation of the ADEA was willful.

The conversation at the charge conference clearly treated 401(k) payments as "part of the pension benefits," J.A. at 780 (emphasis added), but it is not clear whether the parties were treating the future payments as back pay. The plaintiffs' closing argument discussed back pay, front pay, pension benefits, and 401(k) payments, in that order. J.A. at 786-87. The verdict form, however, had space only for back pay and front pay, leaving the jury to classify pension and 401(k) benefits as it saw fit. Although plaintiffs' counsel at one point referred to the claimed future pension benefits as "lost wages," J.A. at 787, this apparent slip of the tongue did not suffice to put FERMCO on notice that all pension benefits would be considered back pay. We conclude that FERMCO did not forfeit this issue and that only the portion of the damages that truly represents "back pay" should be doubled. Because $269,353 of the jury's "back-pay" award was compensation for Skalka's expected pension, that amount should be treated as front pay rather than back pay.

(2) Speculative Nature of Pension Benefits

FERMCO also argues that there was insufficient evidence to support the award of any pension benefits because

those benefits were too speculative. FERMCO's argument on this point focuses on Conover, who in light of our holdings above is not entitled to any damages. FERMCO points out that the project was expected to last only ten to fifteen years and therefore would have ended before Conover turned 65. It claims that after the project is completed "'all personnel will move on to other employment or retirement.'" FERMCO Br. at 42 (purporting to quote J.A. at 302). However, the document it cites for this proposition is rather vague. J.A. at 302 ("Whether such employees [will] have a continued presence at the [site] will depend upon the availability of other work for which they are qualified.").

Skalka was several years older than Conover and would have retired within the projected lifetime of the project. FERMCO's arguments that the pension component of the damages was speculative do not apply to him, and the jury was within its rights to award him damages for his lost pension. Thus, except as discussed in the next section, this portion of the award may stand as a component of front pay.

(3) Failure to Discount the Pension to Present Value

Perhaps because it erroneously treated the pension benefits as back pay, the jury failed to discount them to present value. The plaintiffs' justification of the damages to the district court made the same error, and they do not attempt to defend the error on appeal.

We have in the past been vigilant in correcting juries' failures to discount damages to present value. See, e.g, *Rodgers v. Fisher Body Div., Gen. Motors Corp., 739 F.2d 1102, 1105-06 (6th Cir. 1984)* (raising this issue sua sponte),

cert. denied, *470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1759 (1985).* We therefore instruct the district court to apply an appropriate discount rate to the pension benefits in calculating the remittitur and carefully to instruct the jury on this issue if there is a re-trial.

(4) Failure to Reduce Back Pay to Account for Other Income

FERMCO claims that the jury unreasonably failed to subtract Skalka's early retirement benefits and money he earned through other employment from his back-pay award.

Skalka's back-pay award -- $218,554 once the future pension benefits are re-classified as front pay -- compensated him for his lost salary and benefits up until the time of the verdict. n4 FERMCO argues that this award should be reduced because, several months after his termination, Skalka secured a higher-paying position with another company. Skalka had a duty to mitigate his damages by seeking new employment, but the burden of proving reductions in Skalka's damages is on FERMCO. See *Jackson v. City of Cookeville, 31 F.3d 1354, 1359 (6th Cir. 1994).* Therefore, the remittitur calculated on remand should reflect Skalka's new employment to the extent that any rational jury would have found this income to be proven. We note that Skalka is not entitled to back pay for any period in which he earned an equal or higher salary than he would have earned at FERMCO, see *EEOC v. New York Times Broad. Serv., Inc., 542 F.2d 356, 359 (6th Cir. 1976),* but that his "excess" earnings are not to be subtracted from the back-pay award for the period of unemployment. See *Matthews v. A-1, Inc., 748 F.2d 975, 978-79 (5th Cir. 1984);* see also *Darnell v. City of Jasper, 730 F.2d 653, 656-57 (11th Cir. 1984); Leftwich v.*

Harris-Stowe State College, 702 F.2d 686, 693-94 (8th Cir. 1983).

> n4 This figure reflects the stipulated value of Skalka's salary and benefits from the time of his termination until the time of the verdict, minus the amount he received as severance pay.

FERMCO also argues that Skalka's back-pay award should be reduced because he received early retirement benefits during the time between his termination and the trial. Such benefits, however, may constitute payments from a collateral source that are not properly subtracted from the damages awarded to a discrimination plaintiff. See *Hamlin v. Charter Township of Flint, 165 F.3d 426, 432-36 (6th Cir. 1999).* In Hamlin, we set out a test for determining whether pension benefits are collateral. See *id. at 435.* On remand, the district court should apply Hamlin to determine whether Skalka's retirement benefits received up until the time of trial should be subtracted from his back-pay award.

(5) Front Pay

FERMCO asserts in its brief that Skalka's front-pay award should be vacated:

> Under the ADEA, "a substantial liquidated damage award may indicate that an additional award of front pay is inappropriate or excessive." *Weaver v. Amoco Prod. Co., 66 F.3d 85, 89 (5th Cir. 1995).* But at the same time that the jury was giving Skalka and Conover inflated liquidated damage awards, it

> was also giving them huge front-pay awards. These front-pay awards . . . should be vacated.

FERMCO Br. at 45. This argument is no longer applicable because our decision classifying Skalka's pension as front pay will have the effect of substantially reducing the "liquidated damages" (i.e., the doubled back pay to which Skalka is entitled because the jury found that FERMCO discriminated willfully). The remainder of this section of FERMCO's brief is devoted to Conover's claim, and the arguments are not applicable to Skalka. As FERMCO acknowledges, this circuit has held that the amount of front pay is for the jury to decide, see *Roush, 10 F.3d at 398,* and FERMCO has not pointed to any identifiable flaw in the jury's determination. Thus, when the district court determines the remittitur, it should allow the front-pay award to stand as determined by the jury, adjusted consistent with this opinion.

(6) Overlap Between ADEA and Contract Damages

FERMCO claims that it made no sense for the jury to award contract damages, since Skalka was fully compensated for his lost pay (past and future) through his ADEA damages. Although we have held that Skalka's contract claim fails as a matter of law, the plaintiffs' calculation of the damages makes the not unreasonable assumption that the jury simply chose to "allocate" some of the total damages to the contract claim. J.A. at 87-89. Therefore, in determining the remittitur, the district court should start with the total amount awarded, rather than just throwing out the contract damages. For example, under both claims the plaintiffs asked the jury to award damages for lost 401(k) payments. The damages figures for the ADEA claims suggest that the jury did not

include 401(k) damages in its back-pay calculations, but it may have taken the 401(k) payments into account in the damages it allocated to the contract claim. The court's duty in calculating a remittitur is to determine the maximum amount the jury could reasonably have awarded. See *Katch v. Speidel, Div. of Textron, Inc., 746 F.2d 1136, 1144 (6th Cir. 1984)*. Therefore, the remittitur should assume that the jury awarded damages for 401(k) payments at the rate requested by Skalka and that Skalka is entitled to 401(k) damages whether or not the jury lumped them into its contract claim award.

(7) Summary of Damages Issues

In summary, the district court's determination of the remittitur should take into account the following. Skalka's back-pay award properly includes the stipulated value of Skalka's salary and benefits less severance pay ($218,554), reduced to the extent required by his other employment and early retirement benefits. The front pay award may stand as determined by the jury, increased by an amount to compensate for Skalka's lost pension ($269,353 in future payments, which should be reduced to present value). In addition, the damages allocated by the jury to Skalka's contract claim may be re-allocated if appropriate to either back pay or front pay, to the extent that a reasonable jury could have awarded more on the ADEA claim. Finally, the back-pay award is doubled due to the finding of willfulness.

D. POST-JUDGMENT INTEREST

The parties dispute whether post-judgment interest on the jury's awards accrued from the date on which the district court entered an initial judgment memorializing the verdicts

or from the later date on which the court entered a final, appealable judgment disposing of all claims. This question of statutory interpretation is one of first impression in this court and, so far as we are aware, in any federal court. We hold that interest runs from the date of the initial judgment.

On August 12, 1996, the district court entered an order, which it titled "Judgment Order," awarding judgment and damages on the ADEA and contract claims. The court, however, specifically reserved judgment on the state age discrimination claims, which had not been given to the jury. A later order disposed of post-trial motions without mentioning the state claims. FERMCO appealed, and Conover filed an untimely cross-appeal. To save the cross-appeal, the plaintiffs persuaded the district court to enter a new judgment order, on the theory that the previous orders were not final because the state-law claims were still pending. In its new order, dated January 23, 1998, the district court specified that its prior orders should be deemed "final" for most purposes. Although the district court did not specifically address the issue of post-judgment interest, the parties agree that the district court intended to require FERMCO to pay interest from the date of the entry of its partial order on August 12, 1996.

Post-judgment interest is calculated "from the date of the entry of the judgment." *28 U.S.C. § 1961*(a); see *Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990)* (refusing to calculate interest from date of jury verdict). FERMCO relies on the language of Federal Rule of Civil Procedure 54, which says:

> (a) . . . "Judgment" . . . includes a decree and

> any order form which an appeal lies. . . . (b) . . . When more than one claim for relief is presented . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon [certain express findings and directions]. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims . . . .

FED. R. CIV. P. 54 (emphasis added). Contrary to FERMCO's argument, this language does not require the conclusion that any order that is not a final, appealable judgment is not a "judgment." Rather, the use of "includes" and the selective use of the adjective "final" suggests that there can be "judgments" that are not "final, appealable judgments." This conclusion is consistent with common usage. For example, when a court grants summary judgment to a defendant on some claims but holds a trial on others, its entry of judgment after trial does not typically refer to the earlier claims -- there has already been a "judgment" on them. Rule 54 therefore does not definitively answer the question of whether post-judgment interest begins to accrue when the district court enters a partial judgment.

The Supreme Court's decision in Kaiser decided that the plain language of § 1961 required interest to be calculated from the date of the judgment rather than the date of the

verdict. However, the Court also faced a question not directly answered by the plain language of the statute. In Kaiser, the district court set aside the jury's initial findings on damages, holding that they were not supported by the evidence. After a limited re-trial, a new judgment was entered. *Kaiser, 494 U.S. at 830.* In deciding which judgment triggered the accrual of post-judgment interest, the Court looked at when "damages [had] been 'ascertained' in [a] meaningful way." *Id. at 836* (citing *Poleto v. Consolidated Rail Corp., 826 F.2d 1270, 1280 (3d Cir. 1987)).* It concluded that because the first judgment was not supported by the evidence, it did not represent a meaningful assessment of the damages. Interest therefore ran from the date of the entry of the second judgment. See *Kaiser, 494 U.S. at 836.*

We have applied Kaiser to hold that post-judgment interest runs from the date of any judgment that is not entirely set aside. Compare *Adkins v. Asbestos Corp., Ltd., 18 F.3d 1349, 1351-52 (6th Cir. 1994)* (holding that post-judgment interest ran from date of judgment after remand, not judgment that had been reversed on appeal), with *Coal Resources, Inc. v. Gulf & Western Indus., Inc., 954 F.2d 1263, 1273-75 (6th Cir. 1992).* In Coal Resources, we disagreed with the damages that were awarded, but the prevailing party accepted a remittitur. See *id. at 1273-74.* Despite the dramatic difference in the size of the award ($226,563 instead of $8,999,542), we held that damages had been "sufficiently ascertained" on the date of the initial judgment because "the remittitur merely reduced the damages by a distinct amount easily determined from the facts of the case." *Id. at 1275;* see also *Brocklehurst v. PPG Indus., Inc., 907 F. Supp. 1106, 1109 (E.D. Mich. 1995)* (applying same rule when district court reduces damages through remittitur). These cases, however, do not address the issue of whether a

partial, non-appealable judgment triggers the accrual of post-judgment interest.

We believe that the better rule is for plaintiffs to be entitled to post-judgment interest from the date of entry of the initial, partial judgment on the ADEA and contract claims, even though that judgment was not yet appealable. This holding is consistent with the text of § 1961 and the common meaning of the word "judgment." We recognize that it is potentially burdensome to defendants. If a district court enters partial judgment for a plaintiff on one claim but takes a long time to resolve others, the defendant will have to choose between paying the judgment immediately (long before having a chance to appeal) or allowing interest to accrue. On the other hand, postponing the accrual of interest would deprive prevailing parties of the time value of their money. We resolve this dilemma by assuming that Congress has set the rate of post-judgment interest only to compensate for delay, without seeking to punish the losing party. See *Kaiser, 494 U.S. at 835-36* (stating that purpose of post-judgment interest is compensatory). Thus, the defendant will not be unfairly burdened by the accrual of interest because it will continue to have the use of the money.

III. CONCLUSION

We AFFIRM the judgment for Skalka on his ADEA claim but REVERSE the ADEA judgment for Conover. On the contract claims, we AFFIRM the judgment against Conover and REVERSE the judgments for Skalka, Balnites, and Ponsock. We REMAND Skalka's ADEA claim to the district court for determination of an appropriate remittitur and, if necessary, a new trial on damages.

FILED MAR 24, 1997
Kenneth J. Murphy, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT J. SKALKA, et al.

Plaintiffs

C-1-94-568

v.

FERNALD ENVIRONMENTAL RESTORATION MANAGEMENT CORP., et al.,

Defendants

ORDER

This matter is before the Court upon Defendants' combined motions for judgment as a matter of law, for new trial, or to amend judgment (Doc. 112), to which Plaintiffs have filed a memorandum in opposition (Doc. 115), and to which Defendants have replied. (Doc. 118).

Also before the Court is Plaintiffs' renewed motion for judgment as a matter of law as to Plaintiffs Ponsock's and Balnites' ADEA claims (Doc. 114), which Defendants have opposed. (Doc. 117).

Procedural History/The Parties' Claims

Plaintiffs Robert J. Skalka, Joseph L. Balnites, Sr., William E. Ponsock and Charles D. Conover, III

originally filed their joint complaint in the Court of Common Pleas of Hamilton County, Ohio, setting forth claims for age discrimination in violation of federal law, as well as state law claims of age discrimination, breach of contract and promissory estoppel, against FERMCO and Fluor Daniel, their former employers. (See Doc. 1, Ex. A). Defendants removed the action to this Court. (Doc. 1).

The matter proceeded to a jury trial on all claims beginning on July 22, 1996. (See Doc. 84). On August 8, 1996, the jury returned a verdict in favor of all Plaintiffs and against Defendants as to the breach of contract and promissory estoppel claims, and in favor of Plaintiffs Skalka and Conover only and against Defendants as to said Plaintiffs' age discrimination claims. (Doc. 110 [verdict form]; see also Doc. 105). A judgment on that verdict was entered on August 12, 1996. (Doc. 111).

On August 14, 1996, Defendants filed post-trial motions in this Court. (See Doc. 112). Defendants' post-trial filing first renewed Defendants' prior motion, made at the end of Plaintiffs' case, for judgment as a matter of law as to the breach of contract and promissory estoppel claims of all four Plaintiffs (Doc. 112, pp. 1-3, ¶¶ 1-5); as to Plaintiffs Skalka's and Conover's age discrimination claims (Doc. 112, p. 3, ¶¶ 6, 9) and the related findings of willfulness (Doc. 112, p. 3, ¶¶7, 9); and as to Plaintiff Conover's front pay claim. (Doc. 112, p. 3, ¶ 8). In the alternative, Defendants moved for a new trial as to Plaintiffs' Skalka's and Conover's age discrimination claims and as to all Plaintiffs' breach of contract and promissory estoppel claims (Doc. 112, pp. 3-4, ¶¶ 1-2), or

for a reduction in the amount of damages awarded to all Plaintiffs. (Doc. 112, pp. 3-4, ¶ 2 a-c).

On September 3, 1996, Plaintiffs filed a renewed motion for judgment as a matter of law as to Plaintiffs Ponsock's and Balnites' age discrimination claims. (Doc. 114). In support of that motion, Plaintiffs alluded only to "the reasons stated in [Plaintiffs'] Proposed Findings [of fact] and Conclusions [of law] and those previously stated in the record." (Doc. 114, p. 1). Presumably, Plaintiffs Ponsock and Balnites contend that the evidence was sufficient to establish as a matter of law that Defendants deliberately targeted said Plaintiffs for termination during the reduction in force due to their age.

On February 6, 1997, this Court sua sponte entered an amended judgment order, to correct a clerical error in the amount of damages assessed in the original judgment. (Doc. 137). The amended order specified that the original judgment was to remain valid in all other respects. (Doc. 137).

OPINION

Standards Applicable to Motions for Judgment as a Matter of Law

The procedural rules provide as follows regarding motions for judgment made after a trial has commenced:

> **(a) Judgment as a Matter of Law.**
>
> **(1)** If during a trial by jury a party has been fully heard on an issue and

there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

* * *

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned;

- **(A)** allow the judgment to stand,
- **(B)** order a new trial, or
- **(C)** direct entry of judgment as a matter of law; or

(2) if no verdict was returned;
  (A) order a new trial, or
  (B) direct entry of judgment as a matter of law.

Fed. R. Civ. P. 50.

The same standard is applied in ruling on a motion for judgment as a matter of law made before the case is submitted to the jury as is applied to a renewed motion made after verdict. Metromedia Co. v. Fugazy, 983 F.2d 350, 361 (2d Cir. 1992) (citing 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2524 (1971)), cert. denied, 508 U.S. 952, 113 S.Ct. 2445 (1993); see also City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F.Supp. 1306, 1308 n.1 (N.D. Ohio 1980). As on a motion for summary judgment, the court must view all evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences. Cook v. American S.S. Co., 53 F.3d 733, 740 (6th Cir. 1995); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986). According to the United States Court of Appeals for the Sixth Circuit:

> The appropriate standard for measuring the sufficiency of the evidence to [grant a motion for judgment as a matter of law] under Rule 50 of the Federal Rules of Civil Procedure is whether there is evidence upon which the jury could properly support a verdict in favor of the party against whom the motion is made.

Patrick v. South Cent. Bell Tel. Co., 641 F.2d 1192, 1197 (6th Cir. 1980). Such motions should be granted "cautiously and sparingly." 5A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2d § 2524 (1995).

Plaintiffs' Renewed Motion for Judgment as a Matter of Law

Plaintiffs filed their renewed motion on September 3, 1996 (see Doc. 114), exactly 22 days after the August 12, 1996 filing of the judgment entry in this matter. (See Doc. 111). As set forth, supra, the language of the applicable rule specifically requires that a renewed motion for judgment as a matter of law be filed "no later than 10 days after entry of judgment." Fed. R. Civ. P. 50(b). Plaintiffs' renewed motion therefor was untimely as a matter of law, and should be denied on that basis.

Additionally, the Court's subsequent amendment of the original judgment does not alter this result. (See Doc. 137). The procedural rules specifically authorize a court to act sua sponte to correct clerical mistakes affecting a judgment. Fed. R. Civ. P. 60(a). The amended judgment filed on February 6, 1997 was entered for that very purpose -- to correct the inadvertent transposition of two numbers in the calculation of Plaintiff Conover's damages. (See Doc. 137, p. 1 n.1). The amended order expressly stated that "the Original Judgment Order [Doc. 111] remains valid in all other respects." (Doc. 137, p. 1). Plaintiffs thus cannot rely on the amended order to salvage their untimely renewed motion for judgment as a matter of law.

Although the untimeliness of Plaintiffs' renewed motion relieves this Court of any need to analyze that motion's merits, the Court also observes that Plaintiffs would not prevail on the merits of their renewed motion for judgment as a matter of law. The jury was given an opportunity to consider the federal age discrimination claims of all four Plaintiffs included in this action, and concluded from the evidence presented that Defendants had discriminated against two Plaintiffs [Skalka and Conover] on account of their age, but had not similarly discriminated against Plaintiffs Ponsock and Balnites. (See Doc. 110). Without detailing the applicable evidence, the Court finds that the jury's verdict as to Plaintiffs Ponsock's and Balnites' federal ADEA claims is amply supported by the record. (See Doc. 117, p. 2 [Defendants' memorandum in opposition to Plaintiffs' renewed motion for judgment as a matter of law under the ADEA]). The Court therefore will not disturb the jury's decision in that regard.

Defendants' Renewed Motion for Summary Judgment as a Matter of Law

Unlike Plaintiffs' motion, Defendants' renewed motion for judgment as a matter of law was timely filed. (See Doc. 112). The Court therefore will examine each of Defendants' asserted bases for judgment as a matter of law.

1) **Lack of Proof of Promise to/Reliance by Joseph Balnites**

Defendants first argue that they are entitled to judgment as a matter of law as to Plaintiff Balnites' breach of contract/promissory estoppel claim. They contend that

Plaintiff failed to present evidence that Defendants made any promise to Joseph Balnites, or that Mr. Balnites relied on any promise to his detriment. (Doc. 112, p. 1, ¶ 1).

A claim for promissory estoppel made under Ohio law does require proof of a "clear and unambiguous" promise, and of reasonable and foreseeable reliance resulting in injury to the party to whom the promise was made. Healey v. Republic Powdered Metals, Inc., 85 Ohio App. 3d 281, 284 (1992). Mr. Balnites' death prior to trial unquestionably hindered Plaintiff Sharyn Balnites' ability to present direct evidence in support of Mr. Balnites' promissory estoppel claim. Nowhere does Ohio's promissory estoppel standard indicate, however, that the existence of a "clear and unambiguous" promise can be proved only through direct evidence. To the extent that Defendants suggest that "direct and positive" evidence of a promise is required, then, they espouse an "erroneous premise." See Miller v. Pacific Mut. Life Ins. Co., 17 F.R.D. 121, 129 (W.D. Mich. 1954), aff'd, 228 F.2d 889 (6th Cir. 1955).

In the case of deceased parties, material facts often can be established only "by inferences drawn from the testimony and the surrounding facts and circumstances." See id. at 130. Although Mr. Balnites' personal testimony was not available to the jury, the jurors were able to consider the other three Plaintiffs' testimony regarding promises made to them by Defendants. The jury reasonable could have inferred from that evidence that similar promises were extended to Mr. Balnites as well. The jury also reasonably could have presumed that Mr. Balnites refrained from seeking other employment, as Plaintiff Balnites' testified, in reliance upon representations

that Defendants had made to him. The Court therefore concludes that Defendants are not entitled to judgment as a matter of law on Mr. Balnites' breach of contract/promissory estoppel claim.

2) **Lack of Proof of Reliance by Skalka, Ponsock & Conover**

Defendants next argue that the evidence of detrimental reliance presented by Plaintiffs Skalka, Ponsock & Conover was legally insufficient to support their breach of contract/promissory estoppel claims. Defendants characterize Plaintiffs' testimony as showing only that two of the men refrained from requesting a meeting with management, while the third deferred preparing a resume, in reliance upon Defendants' promises. (Doc. 112,p. 2, ¶ 2).

Case law in Ohio does hold that "merely turning down other employment inquiries" does not amount to legally cognizable detrimental reliance. Wing v. Anchor Media, Ltd., 59 Ohio St. 3d 108, 111 (1991). In the same decision, however, the Ohio Supreme Court observed that an employee who had "sought no other employment" while acting in reliance upon an employer's representations **did** present "a jury question . . . of detrimental reliance of a substantial nature." Id. (citing Mers v. Dispatch Printing Co., 19 Ohio t. 3d 100 (1985)). Moreover, the Sixth Circuit Court of Appeals' seemingly contrary suggestion that "forbearing from seeking other employment" would carry "no legal significance" under Ohio law, see Humphreys v. Bellaire Corp., 966 F.2d 1037 (6th Cir. 1992), was made in the context of a breach of contract

claim, **not** a promissory estoppel analysis, and failed to acknowledge the Wing decision. See id.

Other Ohio decisions appear to have adopted the view that forebearing from seeking other employment is sufficiently indicative of detrimental reliance. See Kelly v. Georgia-Pacific Corp., 46 Ohio St. 3d 134, 139 (1989); Villagran v. Central Ohio Bus. Serv., Inc., No. 94APE08-1267, 1995 WL 347419, at *8 (Ohio App. 10 Dist. June 8, 1995); Tersigni v. General Tire, 91 Ohio App. 3d 757 762 (1993); Miller v. BancOhio Nat'l Bank, Nos. 90AP-380, 90AP-551, 1991 WL 64907 at *14 (Ohio App. Apr. 23, 1991). In this matter, the evidence before the jury indicated that after Defendants issued their promises, Plaintiffs continued to work for Defendants, undertook no efforts to find alternative employment, and even abstained from approaching management about the security of their positions during the reduction in force. The evidence was sufficient to support a jury finding that Defendants' promises induced Plaintiffs to believe that their jobs were secure, and that Plaintiffs' subsequent forbearance constituted detrimental reliance.

3 Lack of Proof of Contract Damages

Defendants also contend that they are entitled to judgment as a matter of law on Plaintiffs Skalka's and Conover's breach of contract/promissory estoppel claims, because said Plaintiffs purportedly proved "no contract damages." (Doc. 112, p. 2, ¶ 3). Defendants themselves implicitly concede, however, that their actual objection is not to Plaintiffs' failure of proof, but rather to the overlap between any legally cognizable contract damages and the damages awarded on said Plaintiffs' age discrimination

claims. Defendants in effect seek to strike the contract damages award that they contend represents either "unavailable pain and suffering damages or double counting." (Doc. 112, p. 2, ¶ 3).

To the extent that Defendants' assessment of the basis for jury's contract damages award may be accurate (an issue that this Court will address, infra), their opposition to the contract damages award nevertheless would not warrant judgment as a matter of law on said Plaintiffs' breach of contract/promissory estoppel claims. Rather, a reduction in the damages awarded to account for any duplicative or "unavailable" damages would be a more appropriate remedy. Defendants' motion for judgment as a matter of law on that basis therefore is denied.

4) Plaintiff Conover's Failure to Appeal

Defendants next contend that Plaintiff Conover is legally precluded from pursuing a breach of contract/promissory estoppel claim because he failed to appeal his termination in accordance with FERMCO's internal procedures. (Doc. 112, p. 2, ¶ 4). In opposing Defendants' renewed motion for judgment as to other grounds, Plaintiffs failed even to address this argument. (See Doc. 115).

The Ohio Supreme Court has held that an employee of a private enterprise must exhaust the administrative remedies provided through his employer's internal review procedures before seeking judicial review of his termination. Nemazee v. Mt. Sinai Med. Ctr., 56 Ohio St. 3d 109 (1990). The Court in Nemazee found that the plaintiff physician's failure to exhaust his administrative

remedies following his termination mandated dismissal of his breach of contract action. Id. at 115. That holding has been applied in other contexts as well. See Salvation Army v. Blue Cross & Blue Shield of N. Ohio, 92 Ohio App. 3d 571 (Cuyahoga Cty. 1993) (affirming dismissal for failure to exhaust of plaintiff hospital's suit against insurer for bad faith breach of contract); Oruma v. Ohio Northern Univ., No. 6-95-19, 1996 WL 492250 (Ohio App. 3 Dist. July 5, 1996) (affirming dismissal for failure to exhaust of plaintiff faculty member's challenge to tenure denial).

Plaintiffs apparently concede that Plaintiff Conover did not pursue an administrative review of his termination. In responding orally at trial to Defendants' original motion for judgment as a matter of law, however, counsel for Plaintiffs argued that an administrative appeal would have been futile. Considering a comparable argument in Nemazee, the Ohio Supreme Court rejected futility as an excuse for failure to exhaust, stating as follows:

> . . . [A]ppellee contends pursuing any administrative remedy would be a vain act.
>
> . . . [A] "vain act" occurs when an administrative body lacks the authority to grant the relief sought; a vain act does not entail the petitioner's probability of receiving the remedy. The focus is on the power of the administrative body to afford the requested relief, and not on the happenstance of the relief being granted.

Id., 56 Ohio St. 3d at 115 (emphasis in original).

Plaintiffs have not alleged that the group designated to perform FERCMO's administrative review process lacked authority to act upon Plaintiff Conover's termination, and the record likewise provides no basis for doubting that group's power to so act. At best, Plaintiffs appear to have suggested that those designated to conduct the administrative review on FERMCO's behalf reflexively would have declined to reverse Plaintiff Conover's termination, regardless of their empowerment. The Nemazee decision definitively establishes that presumed futility of that nature is insufficient to constitute waiver of the exhaustion requirement. Id. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff Conover's breach of contract/promissory estoppel claim.

5) Lack of Proof of Promise of Continued Employment

Defendants also aver that the alleged promises identified by all four Plaintiffs as a basis for their breach of contract/promissory estoppel claims were insufficient as a matter of law to support those claims. (Doc. 112, pp. 2-3, ¶ 5). The Court concludes that the evidence of representations purportedly made by Defendants to Plaintiffs, as described in Plaintiffs' opposing memorandum (see Doc. 115, pp. 5-6) and as contained in the trial record, was sufficient to support a jury finding, consistent with the applicable law. The Court will not disrupt the jury's finding on that issue.

6) Lack of Proof that Plaintiff Skalka was Replaced

Defendants urge that Plaintiff Skalka's failure to prove that he was replaced upon termination entitled Defendants to judgment as a matter of law. (Doc. 112, p. 3, ¶ 6). Defendants suggest that Plaintiff Skalka's position as "RSO representative for CRU 2" was eliminated, and cite Barnes v. GenCorp Inc., 896 F.2d 1457 (6th Cir. 1990) for the proposition that an older employee has no inherent right to displace other similarly situated workers.

The same court that decided Barnes, however, also has recognized the incongruity of requiring a terminated employee to prove replacement "[i]n cases involving work force reduction, . . . [because] an employee terminated in a reduction in force is not replaced." Reeher v. Baker Material Handling Corp., 996 F.2d 1216, 1993 WL 220559 at *1 (6th Cir. June 23, 1993) (citing Barnes, 896 F.2d at 1465). Instead, an age discrimination plaintiff terminated during a work force reduction must present "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." Barnes, 896 F.2d at 1465; see also Butler v. Ohio Power Co., 91 F.3d 143, 1996 WL 400179 at *4; Russell v. Teledyne Ohio Steel, 892 F.2d 1044, 1990 WL 812 (6th Cir. Jan 8, 1990) (citing Laugeson v. Anaconda Co., 510 F.2d 307, 312 & 317 (6th Cir. 1975)). Acceptable alternative proof could consist of evidence indicating that the terminated employee "possessed qualifications superior to those of a younger co-worker working in the same position as the plaintiff." Barnes 896 F.2d at 1466.

Although Plaintiff Skalka did not prove that he was replaced by a younger person, the record did establish that Defendants retained younger employees in positions parallel to Mr. Skalka's. Moreover, the evidence suggested that when Defendants eventually eliminated the remaining RSO representative positions -- the same action offered to justify Mr. Skalka's termination -- the younger RSO representatives were transferred to other positions rather than fired. The Court finds that evidence of Defendants' more favorable treatment of the younger RSO representatives, as well as other evidence in the record, could lead a reasonable jury to conclude that Defendants had targeted Plaintiff for termination due to his age, in order to retain the younger RSO representatives. Defendants therefore are not entitled to judgment on that basis.

7) **Lack of Proof of Willfulness re Skalka Discharge**

In its verdict, the jury concluded that "Defendants knew or showed reckless disregard for whether their conduct violated the laws prohibiting age discrimination in employment" as to Plaintiffs Skalka and Conover. (See Doc. 110, p. 2, ¶ 2). Claiming that the only evidence of willfulness was "[t]he 4/5's rule violation [that] did not pertain to Skalka's division," Defendants argue that the jury's finding of willfulness is unsupported as to Defendant Skalka. (Doc. 112, p. 3, ¶ 7; Doc. 118, pp. 12-13, ¶ 7). Defendants later concede, however, that "Plaintiffs also rely on Skalka being rated higher than other RSO representatives and [on] the loss of the ranking forms for the other employees." (Doc. 118, pp. 12-13, ¶ 7).

Defendants' efforts to minimize the significance of those discrepancies notwithstanding, the existence of irregularities in the employee ranking process does tend to undermine any presumed integrity of that device. Defendants' seemingly cavalier approach to the ranking process could lead a jury to suspect that defendants never intended to use the rankings as a meaningful, accurate and objective basis for their termination decisions, but rather planned to rely upon other, perhaps predetermined, factors. To the extent that jurors construed discrepancies in the rankings as evidence that Defendants intended to consider Mr. Skalka's age as a negative factor in making reduction in force decisions, their finding that Defendants acted willfully is supported by the record.

8) Reinstatement as Preferred Remedy re Plaintiff Conover

Defendants next contend that judgment as a matter of law is appropriate as to Plaintiff Conover's front pay claim, as they claim to have offered to reinstate Mr. Conover's employment, "the preferred remedy." (Doc. 112, p. 3, ¶ 8).[1] Plaintiffs challenge Defendants' assertion, denying that Defendants ever offered reinstatement or that reinstatement would be appropriate herein. (Doc. 115, p. 10, ¶ 5).

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[1] The Court notes that Defendants' motion is moot to the extent directed toward any front pay damages that may be included in Plaintiff Conover's breach of contract/promissory estoppel damage award, given the Court's ruling, supra, that said Plaintiff's breach of contract/promissory estoppel should be dismissed for failure to exhaust.

Case law in this Circuit does suggest that reinstatement ordinarily is preferable to a front pay award. Schwartz v. Gregori, 45 F.3d 1017, 1023 (6th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 77 (1995). Although decisions also suggest that reinstatement should be denied only in "exceptional circumstances," existing workplace conditions may justify denying reinstatement. See Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1396 (6th Cir. 1990), cert. denied, 498 U.S. 1082, 111 S.Ct. 952 (1991).

Despite Defendants' contention that "no evidence was presented here that reinstatement would be inappropriate" (see Doc. 118, p. 14, ¶ 8), this Court previously determined, based upon representations made by counsel for both parties regarding the acrimonious nature of the relationship between Plaintiffs and Defendants, that reinstatement is not appropriate in this matter. Plaintiff Conover obviously continues to object to reinstatement, and Defendants have offered nothing to dissuade this Court from the impression that reinstatement is neither advisable nor feasible in this instance. The Court thus concludes that Defendants' motion for judgment as a matter of law as to Plaintiff Conover's front pay award should be denied.

9) Remaining Grounds for Judgment as a Matter of Law

Defendants conclude their renewed motion for judgment as a matter of law with a catch-all reference to "[a]ll other grounds raised in [their] previous motions . . ., including the insufficiency of evidence to support plaintiff Conover's age discrimination claim, and claim of willfulness." (Doc. 112, p. 3, ¶ 9).

As the "catch-all" motion so presented fails to elaborate on any grounds therefor other than as to Plaintiff Conover's age discrimination claim, the Court defers to the record, together with the Court's prior responses to Defendants' prior motions, in denying Defendants' motion as to any and all other arguments that may be encompassed therein. As to the sufficiency of evidence and the evidence of willfulness with respect to Plaintiff Conover's ADEA claim, the Court also concludes that Defendants are not entitled to judgment as a matter of law. Rather, the Court concludes that the evidence presented was sufficient to support the jury's conclusion that Plaintiff Conover's age "was a determining factor in Defendants' decision to terminate his employment," as well as the jury's conclusion that "Defendants knew or showed reckless disregard for whether their conduct violated the laws prohibiting age discrimination in employment." (See Doc. 110, ¶¶ 1, 2).

Standards Applicable to Motions for New Trial

In an action tried to a jury, "[a] new trial may be granted to any of the parties and on all or part of the issues . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). Although not enumerated in Rule 59, grounds for a new trial may include that the verdict is against the weight of the evidence, excessive damages, errors in the admission or exclusion of evidence, or other reasons rendering the trial unfair. 11 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2d § 2805 (1995). A court's discretion to grant a new trial is restricted, however, by the following conditions:

> **No error** in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties **is ground for granting a new trial** or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, **unless refusal to take such action appears** to the court **inconsistent with substantial justice**. The court at every stage of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

Fed. R. Civ. 61 (emphasis added). Accordingly, "ordering a new trial is inappropriate unless . . . there has been a substantial miscarriage of justice." Merkel v. Scovill, Inc., 573 F.Supp. 1055, 1064 (S.D. Ohio 1983) (Spiegel, J.).

Defendants' Motion for New Trial/to Amend Judgment

As an alternative to their motion for judgment as a matter of law, Defendants have moved for a new trial or for a reduction of the amount of damages as to certain aspects of Plaintiffs' claims. (Doc. 112, pp. 3-4). The Court will address each of those claims separately.

1) **ADEA Verdict as Against Weight of Evidence**

Defendants first urge that they are entitled to a new trial on Plaintiffs Skalka's and Conover's ADEA claims

because the verdict favoring those Plaintiffs is "against the weight of the evidence." (Doc. 112, p. 3, ¶ 1). In support of this assertion, Defendants reiterate the arguments advanced in support of their motion for judgment as a matter of law on said Plaintiffs' ADEA claims -- i.e., that Plaintiff Skalka was not replaced and did not present other viable evidence of discriminatory animus, and that Plaintiff Conover also failed to present evidence sufficiently indicative of a discriminatory motive for his termination.

As the record indicates, however, Plaintiffs did present evidence indicating that Defendants treated other, younger employees more favorably than Plaintiffs Skalka and Conover during the reduction in force; suggesting that the reasons given for Skalka's and Conover's less favorable treatment were not credible; and further implying that the justifications Defendants gave therefore must have been a pretext for age discrimination. The jury verdict suggests that the jury rejected Defendants' proffered reasons for terminating Plaintiffs Skalka and Conover while retaining other, younger employees, and accepted Plaintiffs' version of events.

Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are functions generally to be entrusted to the jury. See Anderson, 477 U.S. at 255, 106 S.Ct. at 2513. Moreover, conflicts in evidence are not enough to warrant setting aside a verdict -- "[i]ndeed the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." 11 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2d § 2806 (1995). The fact that

this jury found for two Plaintiffs but against the other two Plaintiffs on their respective age discrimination claims is a further indication that these jurors conscientiously discharged their duties. As the Court concludes that the record contains sufficient evidence to support an inference that Defendants' decisions to terminate Plaintiffs Skalka and Conover were premised upon factors other than legitimate business reasons, and specifically, upon age, the Court will not disturb that portion of the jury's verdict as being against the weight of the evidence.

2) Damage Awards as Excessive

Finally, Defendants contend that the damages awarded to all Plaintiffs are excessive and must "reflect passion or prejudice" on the part of the jury, thereby requiring either a new trial or an amendment of the judgment in order to reduce the damage award. (Doc. 112, pp. 3-4, ¶ 2).

If Defendants are correct as to the influence of passion or prejudice on this jury's award, the Court is foreclosed from reducing the amount of damages. In such instances, a new trial is required. See Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501 (1931); Merkel, 573 F.Supp. at 1064 (citing id.).

If a verdict is excessive for reasons other than passion or prejudice, however, a court may either order a new trial or alter or amend the amount of the judgment, see Fed. R. Civ. P. 59, 61, but "may not arbitrarily reduce the amount of damages." 11 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE:

CIVIL 2d § 2815 (1995). Only where certain identifiable sums should not have been included in the verdict as a matter of law may a court unilaterally reduce the damage award. See e.g., Westchester Fire Ins. Co. v. Hanley, 284 F.2d 409, 418 (6th Cir. 1960) (reducing damage award by 25 percent in accordance with apportionment provision of insurance policy), cert. denied, 365 U.S. 869, 81 S.Ct. 903 (1961); Scottish Union & Nat'l Ins. Co. v. Bejcy, 201 F.2d 163, 165-66 (6th Cir. 1953) (reducing damage award to exclude special damages not recoverable under policy). Otherwise, the court must offer the party to whom damages were awarded the choice of a new trial or of reduced damages in an amount set by the court. Brewer v. Uniroyal, Inc., 498 F.2d 973, 976 (6th Cir. 1974) (citing Dimick v. Schiedt, 293 U.S. 474, 476, 55 S. Ct. 296 (1935)). "The District Court cannot, without the consent of the parties, substitute its judgment for that of the jury on the issue of just compensation," as "to do so would erode the parties' Seventh Amendment guarantee of a jury trial." Id.

The record in this case reveals no basis for assuming that the amount of damages awarded was in any way attributable to jury passion or prejudice. The voir dire examination and trial proceedings revealed no cause for anticipating bias or extremism on the part of any juror. None of the evidence presented at trial could be deemed so inflammatory as to have been likely to arouse a highly emotional response from the jury. In addition, the jury's verdict was not so grossly one-sided or excessive as to be inherently suspect; to the contrary, the jury found in favor of Defendants on two Plaintiffs' age discrimination claims, and the damages awarded unquestionably bore some correlation to salaries and benefits that Plaintiffs might

have earned, had they remained in Defendants' employ. (See Doc. 112, pp. 5-8, Schedules A-D; Doc. 115, pp. 7-9, Schedules 1-2).

Given Defendants' inability to identify any reasonable basis for ascribing the jury's decision to passion or prejudice, this Court is unwilling to presume that the damage awards were inflated by impermissible considerations. The Court thus concludes that a new trial is not mandated due to passion or prejudice on the part of the jury. The Court will examine, however, whether a new trial or a reduction in the amount of damages is warranted for other reasons.

a. Age Discrimination Claims of Skalka and Conover

Defendants argue that the ADEA back pay damages awarded to both Plaintiffs who prevailed on their age discrimination claims equalled more than three times the back pay losses actually incurred by those individuals. Defendants propose that the purportedly excessive back pay awards are attributable to the jury's failure to account for severance pay and interim earnings that Plaintiffs Skalka and Conover had received. Defendants thus argue that the awards must be reduced accordingly. (Doc. 112, p. 4, ¶ a).

Plaintiffs, in response, attempt to demonstrate how the jury's ADEA back pay awards can be reconciled with Skalka's and Conover's projected earnings from the date of their terminations through the time of trial. Plaintiffs suggest that rather than severance pay and interim earnings, the jury's back pay awards may include

prospective pension benefits lost as a result of the terminations. (See Doc. 115, pp. 7-9). When lost pension benefits are included in the back pay figures, Plaintiff reasons, those awards are not excessive.

Both Defendants' and Plaintiffs' respective approaches, however, incorporate a fair amount of conjecture as to the jury's thought processes in calculating the ADEA back pay awards -- a practice in which this Court is not similarly free to engage. In determining whether the award is excessive, the Court cannot indulge in idle and unfounded speculation as to the basis for the jury's conclusions. Given that Plaintiffs have proposed some tenable basis for rationalizing the jury's numbers with the losses proved by Plaintiffs Skalka and Conover, however, the Court also cannot conclude that the ADEA back pay awards are per se excessive. Defendants' motion for a new trial or to amend judgment on that basis therefore is denied.

b. Overlap between Age Discrimination/Contract Damages

Defendants next argue that the damages awarded for Plaintiffs Skalka's and Conover's promissory estoppel/breach of contract claims duplicate the damages awarded for their ADEA claims. In light of the Court's ruling, supra, that Plaintiff Conover's promissory estoppel/breach of contract claim must be dismissed for failure to exhaust his administrative remedies, Defendants' concerns in this regard are moot as to Plaintiff Conover.

As to Plaintiff Skalka, however, Plaintiffs attempt to distinguish the ADEA damages awarded from the

promissory estoppel/breach of contract damages by again making assumptions regarding what potential components of damage the jury assigned to which damage award. (See Doc. 115, pp. 7-9). Again, neither the parties nor the Court has any definitive insight into the actual basis for the jury's damage awards. Plaintiffs having offered some **plausible** explanation for an award of contract damages not covered by the ADEA award, however, the Court is unwilling to reduce the judgment or to order a new trial.

c. Contract Damages Awarded to Balnites & Ponsock

Finally, Defendants urge that the contract damages awarded to Plaintiffs Balnites and Ponsock exceed the amount of damages proved at trial for those parties. (Doc. 112, p. 4, ¶ c). Plaintiffs counter that the jury awards were within the scope of damages those Plaintiffs were shown to have sustained, or that the jury could have found. (Doc. 112, p. 11, ¶ 8).

As the Court finds that the record contains sufficient evidence on which the jury could have premised its damage awards for Plaintiffs Balnites and Ponsock, Defendants' motion for new trial or to amend judgment on that basis is denied.

IT IS THEREFORE ORDERED that Plaintiffs' renewed motion for judgment as a matter of law as to Plaintiffs Ponsock's and Balnites' ADEA claims (Doc. 114) hereby is DENIED in its entirety; that Defendants' motion for new trial or to amend judgment (Doc. 112) hereby is DENIED in its entirety; and that Defendants'

motion for judgment as a matter of law (Doc. 112) hereby is GRANTED in part and DENIED in part, as follows:

> 1) Defendants' motion for judgment as a matter of law as to Plaintiff Conover's breach of contract/promissory estoppel claim based upon said Plaintiff's failure to exhaust his administrative remedies hereby is GRANTED; the judgment previously entered in favor of Plaintiff Conover and against Defendants in the amount of $181,000 on Plaintiff Conover's breach of contract/promissory estoppel claim hereby is VACATED; Plaintiff Conover's breach of contract/promissory estoppel claim hereby is DISMISSED; and the Clerk of Courts hereby is DIRECTED to enter a judgment in favor of Defendants and against Plaintiff Conover, dismissing said Plaintiff's breach of contract/promissory estoppel claim only as of the date of this order; and
>
> 2) Defendants' motion for judgment as a matter of law hereby is DENIED in all other respects.

IT IS SO ORDERED.

\s\ Herman J. Weber, Judge
United States District Court

FILED
JUL 21 1999
LEONARD GREEN, CLERK

97-3493/98-3122/3123

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT J. SKALKA, ET AL.	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	ORDER
	)	
FERNALD ENVIRONMENTAL RESTORATION MANAGEMENT CORPORATION, ET AL.	)	
	)	
Defendants-Appellants.	)	
	)	

BEFORE: MERRITT, GUY and MOORE, Circuit Judges.

This court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

\s\ Leonard Green, Clerk

*Judge Nelson recused himself from participation in this ruling.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the foregoing Petition for Writ of Certiorari was served on Doreen Canton, Esq., Counsel for Respondents, Taft, Stettinius & Hollister, 1800 Firstar Center, 425 Walnut Street, Cincinnati, Ohio 45202, Telephone (513) 357-9368, by regular U.S. Mail this 18th day of October, 1999.

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Counsel for Petitioner

Supreme Court, U.S.
FILED
NOV 19 1999
CLERK

(2)

No. 99-679

In The

Supreme Court of the United States

CHARLES D. CONOVER, III,

Petitioner,

v.

FERNALD ENVIRONMENTAL RESTORATION MANAGEMENT CORP., FLUOR DANIEL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Should this Court deny certiorari when the decision below does not raise the question presented and the petition instead would require this Court to make a fact-specific determination regarding the sufficiency of the evidence?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Fluor Corporation is publicly held. Fluor Enterprises, Inc. (formerly known as Fluor Daniel, Inc.) is a wholly owned subsidiary of Fluor Corporation. Respondent Fluor Daniel Fernald, Inc. (formerly known as Fernald Environmental Restoration Management Corporation ("FERMCO")) is a wholly owned subsidiary of Fluor Enterprises, Inc.

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STATEMENT OF THE CASE

After Robert Skalka, Joseph Balnites, William Ponsock and Petitioner Charles Conover were discharged in a large reduction in force, they filed a joint lawsuit against Respondents claiming age discrimination under federal and Ohio law and breach of contract under Ohio common law.

After a trial, a jury found that Petitioner and Skalka were discriminated against because of their age, but rejected the age discrimination claims of Balnites and Ponsock. The jury found in favor of all four plaintiffs with respect to their breach of contract claims.

Respondents moved for judgment as a matter of law because the jury's verdict was not supported by sufficient evidence. The district court granted Respondents' motion with respect to Petitioner's breach of contract claim, but denied the motion with respect to all other claims.

Respondents appealed to the United States Court of Appeals for the Sixth Circuit. Petitioner cross-appealed from the entry of judgment as a matter of law for Respondents as to his breach of contract claim. The Sixth Circuit held that the evidence at trial was insufficient with respect to Petitioner's age discrimination claim and the breach of contract claims of all four plaintiffs. The Sixth Circuit found that Skalka's age discrimination verdict was supported by sufficient evidence, but remanded the damages award for calculation of a remittitur.

Petitioner filed a petition for certiorari on an issue not raised before or decided by the Sixth Circuit. The Sixth Circuit did not require a showing of "pretext plus."

The Sixth Circuit's fact-specific determination that Petitioner's "evidence" of age discrimination was insufficient does not present any issues warranting this Court's review.

STATEMENT OF THE FACTS

Although Petitioner recites the same "facts" and "evidence" considered and rejected by the Sixth Circuit, the actual evidence at trial was different than Petitioner portrays. Petitioner was lawfully discharged, along with 126 other employees, in a large reduction in force at the U.S. Department of Energy's Fernald site.

The Fernald site is located in northwestern Hamilton County, Ohio. The federal government owns the site, but various contractors have operated it. From the 1950's until 1985, National Lead of Ohio operated the site under contract with the federal government to produce enriched uranium metal. National Lead of Ohio's contract expired at the end of 1985, and Westinghouse took over the production work for three more years. Eventually, however, the government directed Westinghouse to stop producing enriched uranium metal at Fernald, and the site was designated for environmental clean-up.

While Westinghouse did preparatory work, the Department of Energy sought a restoration management contractor to handle the clean-up. In 1992, Respondent Fluor Daniel Fernald, Inc. (formerly known as Fernald Environmental Restoration Management Corporation) ("FERMCO") entered into a five-year contract with the government. After a transition period, FERMCO replaced

Westinghouse on December 1, 1992. At that time, FERMCO hired many employees (including Petitioner) who had been working at the site for Westinghouse or various subcontractors.

Initially, the Department of Energy told FERMCO that it could expect $2.2 billion in funding over the next five years. FERMCO hired employees in reliance on this anticipated funding level. But in the spring of 1993, the government asked FERMCO to make projections based on the assumption that it would receive $600 million less over that period. In light of this expected 27% budget cut, on April 29, 1993, FERMCO notified employees that some of them might lose their jobs as a result of the anticipated budget cuts.

To help it select whom to discharge, FERMCO developed a "forced ranking" process and trained managerial personnel in its use. FERMCO's executive management first identified five company-wide "values" on which all salaried employees would be rated. Within each of FERMCO's twenty divisions, salaried employees were then divided into "peer groups," and supervisory personnel identified four "essential skills" for each peer group. Supervisory personnel then rated each employee on the five company-wide "values" and on the four "essential skills" applicable to that employee's peer group. Within each peer group, employees were ranked on the basis of these ratings.

FERMCO's executive management determined the number of employees who would be cut from each division. Taking into account the results of the forced ranking

process, division managers then determined which particular employees would be terminated involuntarily in the reduction in force.

In 1992, Petitioner was manager of procurement for Westinghouse at the Fernald site. When FERMCO took over the clean-up, Al Valdez initially made Petitioner manager of subcontracts. The subcontracting was more complex and involved higher dollar values than ordinary procurement, and Conover struggled with the new job. In February, 1993, because of problems with certain subcontracts, Valdez hired Gwen Nalls as manager of major subcontracts and moved Conover back to the procurement area as a supervisor or "group leader" (one level below manager). Conover and another group leader named Eric Meuser wound up reporting to Lou Henke, who had previously been underneath Petitioner, but who became the new manager of procurement.

Meanwhile, Nalls hired three new group leaders – Paul Simons, Donald Liepold, and Paul Sturgeon – to work under her on subcontracts. All three had extensive experience with government procurement. Unlike Petitioner, all three had been designated by the National Contract Management Association as Certified Professional Contract Managers. Liepold was also a fellow in that organization, which is the highest designation that it can give to a contract professional.

In the "forced ranking" process a few months later, the five group leaders (Petitioner, Meuser, Simons, Liepold, Sturgeon) constituted one peer group. Nalls rated the group leaders (Simons, Liepold, Sturgeon) who

reported to her, and Henke rated the group leaders (Petitioner, Meuser) who reported to him; Nalls and Henke then reviewed a summary of their ratings with their boss, Al Valdez. On a scale of 0 to 5, Sturgeon, Liepold and Simons all scored above 4.30, while Meuser got a score of 3.02. Petitioner's score of 2.58 was the lowest in the peer group. Even that score was inflated by a mathematical error in Petitioner's favor. The math error in Petitioner's favor was the only error that actually affected the scores.

Petitioner's age did not distinguish him from his peer group. Petitioner was only 47 years old at the time of the reduction in force. Simons and Liepold, who were rated higher than Petitioner, were older than Petitioner. Meuser was also in the protected age group and was not significantly younger than Conover. The only member of the peer group who was significantly younger than Conover was Sturgeon, and Petitioner himself admitted that he was not qualified for Sturgeon's position. Notwithstanding the fact that Petitioner's age placed him squarely in the middle of the peer group, Petitioner's brief to the Sixth Circuit falsely asserted that he was the **oldest** person in his peer group.

At trial, Henke explained that while Petitioner did good work, he was not as meticulous, as productive, or as timely with his work as Meuser (his nearest competitor). Meuser also did more to develop the talents of his subordinates, and he invented processes that led to greater team-work within his group. In addition, Meuser handled more complex contracts and made more efforts than Petitioner to develop new industry sources for procurement.

When FERMCO management decided to trim one person from Petitioner's peer group, it selected Petitioner, the lowest rated member of the peer group. In selecting Petitioner for discharge, FERMCO retained two members of Petitioner's peer group who were **older** than Petitioner.

Petitioner was **never** replaced.

On August 9, 1993, 127 salaried employees, including Petitioner, were told that they were being terminated and were immediately taken off their jobs. Nonetheless, FERMCO continued to pay them their full salary and benefits until October 22, 1993, and they also received substantial severance pay after that date.

In addition, FERMCO established an appeals process to let employees who wanted to challenge their termination seek internal review. Petitioner did not file such an appeal.

To help displaced employees find new jobs, FERMCO set up a Resource Center with computers, clerical help and listings of job opportunities both within and outside FERMCO. Resource Center staff also helped displaced employees with their resumés.

At the start of fiscal year 1994, after the displaced employees had been off the job for two months, FERMCO learned that it would have $30 million more than it had expected in available funds. Because these additional funds enabled it to do more work, FERMCO hired more people. Some of the people who had been involuntarily terminated as part of the reduction in force were brought back at this time. But FERMCO did not rehire Petitioner,

nor did it hire anyone to fill his job. Events had proved that FERMCO did not need a procurement group leader in Petitioner's position.

Recognizing the potential legal issues, including discrimination issues, that could arise out of such a large reduction in force in these litigious times, FERMCO took precautions against any sort of discrimination. As part of the forced ranking process, FERMCO instructed its decisionmakers not to discriminate on the basis of age or other prohibited grounds.

Further, FERMCO conducted a statistical analysis of the entire reduction in force after the "forced ranking" process had been completed, but before affected employees had been notified of their termination, to assess whether the reduction in force might have a disparate impact on members of protected groups, including people over 40. Application of a preliminary statistical test called the "fourth-fifths rule" detected no adverse impact in 18 of FERMCO's 20 divisions, but produced a "borderline" result in the acquisition and finance division (which included Petitioner and 141 other salaried employees) and the Administration Division. Esther Hodge, the manager of the Human Resources Department, met separately with the managers of both divisions to discuss the process that they had used and the nature of the "essential skills" on which employees within the respective divisions had been rated. As a result of these discussions, Hodge concluded that the "borderline" results in both divisions were not indicative of discrimination. At trial, unrebutted expert testimony confirmed Hodge's judgment.

The internal appeals process served as a further safeguard against possible discrimination by permitting terminated employees to appeal their discharge on any ground, including discrimination. Petitioner filed no appeal.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

The Sixth Circuit's decision entering judgment as a matter of law for Respondents because Petitioner's evidence was insufficient to establish age discrimination does not present the question asserted by the petition. The Sixth Circuit did not hold that Petitioner had sufficiently established a prima facie case and pretext, but nonetheless needed to present additional evidence of age discrimination. Instead, the Sixth Circuit described the analytical framework for evaluating the sufficiency of the evidence after a jury verdict as follows:

> After a jury verdict, the burden-shifting framework falls away. The question for the court is simply whether there was sufficient evidence to support a finding of age discrimination. However, the elements of that framework remain useful ways of thinking about the evidence and how the jury might reasonably have arrived at its verdict. For example, the elements of the prima facie case, together with the jury's disbelief of the employer's explanation for its actions, are sufficient to support a verdict for the

> employee, although they do not compel such a verdict.

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 421 (6th Cir. 1999) (citations omitted).

Unlike a summary judgment decision, this case involved a motion for judgment as a matter of law after a jury verdict where the Sixth Circuit does not review the existence of a prima facie case. Instead, the Sixth Circuit carefully analyzed the same "evidence" recycled by the petition, and found it insufficient on the ultimate question of whether Petitioner had proven age discrimination.

The petition's academic discussion of "permissive pretext" and "pretext plus" is irrelevant to the resolution of this case. The Sixth Circuit's opinion did not announce any rule regarding "permissive pretext" or "pretext plus." Neither Petitioner nor Respondents even raised the issue of "permissive pretext" or "pretext plus" before the Sixth Circuit. Instead, the parties moved directly to the ultimate question of whether sufficient evidence supported the jury's verdict.

Petitioner's claim that the Sixth Circuit applied a "pretext plus" standard finds no support in the Sixth Circuit's opinion. The Sixth Circuit did not require Petitioner to prove both pretext **and** offer additional evidence of age discrimination. On the contrary, the Sixth Circuit expressly stated that "the elements of the prima facie case, together with the jury's disbelief of the employer's explanation of its actions, are sufficient to support a verdict for the employee, although they do not compel such a verdict." *Skalka*, 178 F.3d at 421.

This case is therefore unlike *Reeves v. Sanderson Plumbing Products, Inc.*, 180 F.3d 263 (5th Cir. April 22, 1999) (unpublished), *cert. granted*, 1999 WL 783937 (Nov. 8, 1999). In *Reeves*, the Fifth Circuit found that:

> To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decision-making process.

Appendix at 7. The Fifth Circuit also found:

> Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

Id. at 10. Unlike the Sixth Circuit, the Fifth Circuit noted that "Reeves very well may be correct" that a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual. *Id.*

This Court should not grant certiorari in this case as it did in *Reeves*. As demonstrated above, the Sixth Circuit did not apply a "pretext plus" standard as the Fifth Circuit did in *Reeves*. Further, the Sixth Circuit did not find that Petitioner had introduced sufficient evidence of pretext.

Petitioner's disagreement with the Sixth Circuit's decision is not based on its analysis of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), but is based instead on the Sixth Circuit's analysis of the sufficiency of the

evidence. The petition itself confirms this point in its discussion of the Seventh Amendment, which would only be implicated if Petitioner's evidence were sufficient to warrant presentation to a jury. *Galloway v. U.S.*, 319 U.S. 372, 389 (1943) ("If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.").

Because the Sixth Circuit's analysis of the sufficiency of the evidence does not raise the question presented in the petition, the petition should be denied.

II. THE SIXTH CIRCUIT'S FACT-SPECIFIC ANALYSIS OF THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE DOES NOT PRESENT ANY QUESTIONS WARRANTING REVIEW BY THIS COURT.

The Sixth Circuit's fact-based decision that Petitioner's "evidence" of age discrimination was insufficient to support the jury verdict raises no important question warranting this Court's review. The Sixth Circuit's analysis of Petitioner's "evidence" was as follows:

> On the ultimate question of whether he has proven discrimination, however, Conover's evidence is too weak to sustain the verdict. It consists of (1) the fact that Henke discussed the possibility of early retirement with older employees but not younger ones, and two employees in their 50s accepted early retirement; (2) a statement by another supervisor that some employees would be laid off because they

> were "too comfortable"; and (3) the assertion "the oldest" of that supervisor's employees were laid off. Skalka Br. at 5. Conover somehow attributes facts (2) and (3) to Henke. These allegations are vague and unsupported by citations to the record. In addition, we do not believe that the "too comfortable" comment is indicative of age bias.
>
> **Most problematic is that Conover relies heavily on the false assertion that he was the oldest member of his peer group. Skalka Br. at 18.** Thus, Conover has not really provided any argument to support the verdict. The most likely explanation for it seems to be that the jury made the same mistake that Conover has made about the ages of his peers and, finding FERMCO's decision irrational and careless, inferred discrimination. We do not think that a reasonable jury could have reached this conclusion on the basis of the correct facts about Conover's age relative to his peer group.

Skalka, 178 F.3d at 422-23 (citation omitted) (emphasis added).

The Sixth Circuit's fact-based ruling that, as a matter of law, Petitioner's "evidence" was insufficient to establish age discrimination does not present an important question for this Court's review. The petition does not assert that the circuits disagree about the sufficiency of any of the three categories of "evidence" the Sixth Circuit found insufficient. The Sixth Circuit's rejection of Petitioner's false contention that he was the oldest member of his peer group, when Petitioner's age actually placed him in the middle of his peer group, presents no issue requiring further review.

Petitioner's "evidence" of age discrimination would be insufficient under any legal standard. The petition should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60334

ROGER REEVES,

Plaintiff-Appellee,

versus

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(96-CV-197)

(Filed Apr. 22, 1999)

Before HIGGINBOTHAM, JONES and WIENER, Circuit Judges.

Per Curiam:*

In this age discrimination case, Defendant-Appellant Sanderson Plumbing Products, Inc. ("Sanderson") appeals the district court's order denying Sanderson's post-verdict motion for judgment as a matter of law

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

("JML"), and granting Plaintiff-Appellee Roger Reeves's motion for front pay. After reviewing the record, we conclude that Reeves did not prove a violation of the Age Discrimination in Employment Act ("ADEA") by a preponderance of the evidence. Hence, we reverse the district court's order and render judgment in favor of Sanderson.

I

FACTS AND PROCEEDINGS

Fifty-seven year old Reeves was employed for 40 years by Sanderson – a company involved in the manufacture of toilet seats and covers. At the time of his discharge, Reeves worked in a department of the company known as the Hinge Room. The Hinge Room ran a regular line which was supervised by Reeves, and a special line which was supervised by 35 year old Joe Oswalt. Forty-five year old Russell Caldwell was the manager of the department and he supervised both Reeves and Oswalt.

At all times relevant to this case, a union represented Sanderson's production and maintenance employees. The union contract included general work rules, part of which dealt specifically with attendance. Pursuant to these rules, an employee who was absent from work in excess of five percent of his scheduled hours in a month, or who was late twice in a month, was subject to disciplinary action.

As part of his essential duties as a supervisor, Reeves was required to keep daily, weekly, and monthly records

of the attendance and tardiness of employees under his control. These records were reviewed by Reeves for accuracy before he passed them on to Caldwell, who then sent them on to data processing.

In the fall of 1993, Sanderson's Department of Quality Control – under the direction of Powe Chesnut – conducted a review of the operating procedures in the Hinge Room. According to Sanderson, the study revealed productivity problems on Reeves's regular line, stemming from a lax assembly line operation. As a result, Reeves was placed on a 90-day probation for unsatisfactory work performance.

Nearly three years later, in the summer of 1995, Caldwell informed Chesnut – who by this time had become Director of Manufacturing – that the Hinge Room was again having difficulty meeting its production requirements due to pervasive absenteeism and tardiness. Because the Hinge Room records did not reflect employee attendance problems, however, Chesnut requested that Lucille Reeves, then-Manager of Quality Control, conduct an audit of the department's time sheets. This investigation revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt. Dana Jester, Vice President of Human Resources, conducted an independent review of the records, and confirmed Quality Control's findings. Armed with these results, Chesnut, Jester, and Vice President of Operations Tom Whitaker, recommended to Company President Sandra Sanderson[1] that Caldwell and Reeves be

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[1] The record is uncontradicted that Ms. Sanderson had married Chesnut in December 1988.

dismissed.[2] Ms. Sanderson – who was 52 years old at the time – heeded this advice, firing both Caldwell and Reeves in October 1995. Thereafter, Sanderson filled Reeves's position, on three successive occasions, with men in their thirties.

In June 1996, Reeves filed suit, claiming that Sanderson terminated him because of his age, in violation of the ADEA. Reeves based his claim on two age-related statements allegedly made by Chesnut several months before Reeves's dismissal, namely (1) that Reeves was so old that he "must have come over on the Mayflower," and (2) that he was "too damn old to do the job."

At the conclusion of the trial, the jury returned a verdict in favor of Reeves, awarding him $35,000 and finding that Sanderson discriminated willfully on the basis of age in its adverse employment action. After the verdict, Sanderson renewed its previous motion for JML, and moved, in the alternative, for a new trial. At the same time, Reeves filed a motion seeking front pay. The district court denied Sanderson's motions, and entered judgment in favor of Reeves in the amount $70,000 – adding $35,000 in liquidated damages to the jury's compensatory damages in that amount based on the jury's determination of

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[2] Chesnut testified at trial that, had Oswalt not voluntarily terminated his employment several months earlier, Oswalt would have been subject to dismissal along with his co-workers, Reeves and Caldwell.

willfulness.[3] In addition, the court awarded Reeves $28,490.80 in front pay, representing two years of lost income. Sanderson timely filed a notice of appeal.

II

ANALYSIS

A. Standard of Review

"A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict."[4] We review the denial of such motions *de novo*, applying the same standard as the district court.[5] A JML is appropriate if the "facts and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded" as the jury did.[6] Applying this standard to the instant case, the district court's judgment should be reversed only if "there is no legally sufficient evidentiary basis for a reasonable jury to find" that Sanderson discharged Reeves because of his age.[7]

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[3] *See* 29 U.S.C. § 626(b) (1990) (providing that "liquidated damages shall be payable only in cases of willful violations of this Act.").

[4] *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir. 1997).

[5] *Nichols v. Lewis Grocer*, 138 F.3d 563, 565 (5th Cir. 1998).

[6] *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 148 (5th Cir. 1995).

[7] FED. R. CIV. PROC. 50 (a)(1).

B. The ADEA

The ADEA makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age."[8] To establish a violation of the ADEA, a plaintiff must prove, by a preponderance of the evidence, intentional discrimination on the part of his employer.[9] As direct evidence of discrimination is rare, plaintiffs may rely on indirect evidence and reasonable inferences to establish an ADEA claim under the *McDonnell Douglas* burden-shifting analysis.[10]

Under this analysis, a plaintiff must first present a prima facie case, thereby establishing a rebuttable presumption of age discrimination.[11] If the plaintiff meets this burden, the employer must then rebut the presumption by articulating a legitimate, nondiscriminatory reason for the challenged employment action.[12] If the employer presents such evidence, then the presumption of discrimination fades, and the plaintiff must prove that

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[8] 29 U.S.C. § 623(a)(1) (1990).

[9] *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997).

[10] *Id.*

[11] *Id.* There are four elements to a prima facie case of discriminatory discharge under the ADEA, including proof that the plaintiff was (1) discharged; (2) qualified for the position; (3) within the protected class at the time of the discharge; and (4) either i) replaced by someone outside the protected class, ii) replaced by someone in the protected class but younger than the plaintiff, or iii) otherwise discharged because of his age. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993).

[12] *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir. 1996).

the employer's articulated reason is a pretext for unlawful discrimination.[13]

To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decision-making process.[14] Age-related comments may serve as sufficient evidence of discrimination if the remarks are (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to that employment decision.[15] Mere "stray remarks" – i.e., comments which are "vague and remote in time" – however, are insufficient to establish discrimination.[16]

1. Sufficiency of the Evidence

On appeal, Sanderson does not challenge the sufficiency of the evidence supporting Reeves's prima facie case of age discrimination.[17] Rather, Sanderson argues

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[13] *Price*, 119 F.3d at 337.

[14] *Id.*

[15] *Brown*, 82 F.3d at 655.

[16] *Id.*; *Price*, 119 F.3d at 337.

[17] Indeed, when, as here, a case has already been tried on the merits, whether the plaintiff properly made out a prima facie case is no longer relevant. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Instead, the important inquiry is whether the plaintiff has "produced sufficient evidence for a jury to find that discrimination has occurred." *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 123 (5th Cir. 1992).

that it articulated a legitimate, nondiscriminatory explanation for firing Reeves: Reeves's shoddy record keeping. Because Reeves failed to offer evidence sufficient to prove *both* that this reason is untrue *and* that age is what really triggered Reeves's discharge, argues Sanderson, it is entitled to judgment as a matter of law. We agree.

At trial, Chesnut testified that he became aware of timekeeping problems in the Hinge Room after Caldwell – the department manager – complained of inadequate production resulting from absenteeism. This complaint prompted an investigation which uncovered numerous errors in the department's attendance records. Because of specific misrepresentations and errors made by Reeves, argues Sanderson, employees under Reeves's control were being paid for time they did not work, and were not being disciplined for their habitual absenteeism and tardiness. Reeves testified that he was familiar with the company's attendance policy, as well as his timekeeping responsibilities as a supervisor under that policy. In light of this admission, argues Sanderson, Reeves's failure to keep accurate records in accordance with the policy amounts to unsatisfactory work performance, which is a legitimate, nondiscriminatory basis for dismissal.

Reeves attempts to cast suspicion on Sanderson's proffered explanation by first asserting that Sanderson's explanation changed between the time of Reeves's discharge and trial. When he was fired, claims Reeves, he was told that he had caused a *specific* employee to be paid for time she had not actually worked. In contrast, Reeves argues, Sanderson defended its employment decision at trial by claiming that Reeves's timekeeping mistakes had resulted in the overpayment of *numerous* employees.

Although proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a "red flag" of pretext,[18] the inconsistency noted by Reeves in this case can hardly be considered mendacious. Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves's work performance was unsatisfactory. That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie.

Reeves goes on, however, to challenge the veracity of Sanderson's allegation that he engaged in inaccurate record keeping at all. At trial, Reeves testified that he was always very careful to ensure that his employees arrived at their work stations on time. In addition, he claimed that any employee who was permitted to clock in early or stay late – and thereby receive additional pay – had extra work assignments to perform. According to Reeves, if any record keeping errors were made, they were the result of Caldwell's inattentiveness and not his own. Moreover, Reeves points out, at trial Chesnut was unable to testify as to the cost to the company, if any, of Reeves's alleged record falsifications. Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual.

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[18] *Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 546 (5th Cir. 1996).

On this point, Reeves very well may be correct. Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

In an attempt to satisfy this burden at trial, Reeves testified that Chesnut – while serving as Director of Manufacturing – made the above-quoted age-related comments just months before Reeves was terminated. As Chesnut was one of three people who recommended his termination to Ms. Sanderson, argues Reeves, Chesnut's comments should be taken as sound evidence of the company's underlying discriminatory motives.

Reeves also expressed the belief that he was treated less favorably than Sanderson's younger employees. This belief, Reeves now claims, is confirmed by Oswalt's testimony that Chesnut treated Reeves like a child. As further evidence of Sanderson's disparate treatment, Reeves points to his 1993 probation, and notes that the 30-something Oswalt was not put on probation despite a similarly lagging production level on the Hinge Room's special line. Likewise, argues Reeves, when Quality Control initiated its investigation of his timekeeping records in 1995, none of the supervisors from other departments were singled out for such scrutiny.

Considering all of the evidence in a light most favorable to Reeves, we nevertheless conclude that there was insufficient evidence for a jury to find that Sanderson

discharged Reeves because of his age. Despite the potentially damning nature of Chesnut's age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination. In addition, Chesnut was just one of three individuals who recommended to Ms. Sanderson that Reeves be terminated, and there is no evidence to suggest that any of the other decision makers were motivated by age. In fact, the record shows that at least two of the decision makers were themselves over the age of 50 – Ms. Sanderson at 52, and Jester at 56. Furthermore, the fact remains that, as a result of the 1995 investigation, each of the three Hinge Room supervisors was accused of inaccurate record keeping, including not only Reeves and Caldwell, but 35 year old Oswalt as well. Finally, there is evidence that, at the time Reeves was dismissed, 20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's.

Based on our plenary review, we find that Reeves did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA. For this reason, we reverse and render judgment in favor of Sanderson.

REVERSED AND RENDERED.